(21,204.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 421.

STANDARD OIL COMPANY, PLAINTIFF IN ERROR,

vs.

ABRAHAM BROWN.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 7, 1909.

In the Court of Appeals of the District of Columbia.

No. 1836.

STANDARD OIL COMPANY, a Corporation, Appellant,
vs.
ABRAHAM BROWN.

a Supreme Court of the District of Columbia.

Law. No. 47936.

ABRAHAM BROWN, Plaintiff,
vs.
STANDARD OIL COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Amended Declaration.*

Filed March 15, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 47936.

ABRAHAM BROWN, Plaintiff,
vs.
STANDARD OIL COMPANY, a Corporation, Defendant.

The plaintiff, Abraham Brown, sues the defendant for that whereas the defendant was at the time of the commission of the grievances hereinafter mentioned, a body corporate duly incorporated under and by virtue of the laws of the State of Pennsylvania, and for a long time prior thereto was, and still is such a body corporate, and whereas it then was and still is the business of the said defendant, among other things, to deal in oils in the city of Washington, District of Columbia, and to that end owned or occupied a certain stable in the City of Washington, District of Columbia, for

the purpose of sheltering and housing certain horses belonging to the said defendant and used by the said defendant for the purpose of carrying on its said business in said City of Washington, District of Columbia, and whereas, heretofore, to wit, on or about the 8th day of February, A. D. 1904, while the defendant was carrying on the said business as aforesaid in the manner aforesaid, the plaintiff was then and there in the employment of the said defendant as a laborer, and plaintiff was then and there required and directed by the said defendant, in the performance of his duty as a laborer as
2 aforesaid, to enter said stable of the said defendant in the said City of Washington, District of Columbia, in which said stable there was a loft or storeroom where the feed for the horses was kept, and a certain hole or opening through which said feed passed from said loft or store-room to the stable below; and it then and there became and was the duty of the said defendant to have the said hole or opening so guarded that the hay and feed from the loft or store-room would not fall upon the said plaintiff while he was in the exercise of his said duty as a laborer in the stable below, yet the defendant, wholly neglecting *their* said duty in that regard, then and there, and while the plaintiff was engaged as aforesaid in said stable in the performance of his duty as a laborer as aforesaid, and in pursuance of the instructions and directions of the defendant as aforesaid, did not protect the said hole or opening in any way whatsoever, but wholly disregarding its said duty in the premises, carelessly and negligently allowed a bale of the said hay to fall through the said hole or opening upon the said plaintiff, who was at work in the stable below, and who was wholly ignorant of the said defendant's careless and negligent manner of protection, being otherwise in the exercise of due care and diligence on his part, in consequence whereof, said plaintiff was struck by the said bale of hay on the side of his head and neck and shoulder, and on the lower portion of his back, and by reason of the said bale of hay striking the said plaintiff as aforesaid, he then and there suffered a severe shock to his whole system, was severely bruised, maimed about his body,
3 besides suffering severe pain and sustaining a permanent internal injury to his ear, head and back, causing permanent deafness in his ear, and was permanently injured in the back and spine and was permanently injured internally, and otherwise greatly hurt and injured to such an extent that he is and for the remainder of his life will be unable to pursue any manual or mental labor, and he has suffered great bodily pain and mental anguish and will continue so to suffer so long as he shall live, and he has been put to great expense in and about endeavoring to be cured of his said injury and has expended large sums of money in procuring medical attention.

Therefore, by reason of the facts in the premises, he has been damaged in the sum of Fifteen Thousand Dollars ($15,000), which amount he claims, besides the costs of this suit.

The plaintiff, Abraham Brown, sues the defendant for that whereas the defendant was at the time of the commission of the

grievances hereinafter mentioned, a body corporate duly incorporated under and by virtue of the laws of the State of Pennsylvania, and for a long time prior thereto was, and still is such a body corporate, and whereas it then was, and still is the business of the said defendant, among other things, to deal in oils in the City of Washington, District of Columbia, and to that end owned or occupied a certain stable in the City of Washington, District of Columbia, for the purpose of sheltering and housing certain horses belonging to the said defendant and used by the said defendant for the purpose of carrying on their said business in said City of Washington, District of Columbia, and whereas, heretofore, to-wit, on or about
4 the 8th day of February, A. D. 1904, while the defendant was carrying on the said business as aforesaid in the manner aforesaid, the plaintiff was then and there in the employment of the said defendant as a laborer, and plaintiff was then and there required and directed by the said defendant, in the performance of his duty as a laborer as aforesaid, to enter said stable of the said defendant in the said City of Washington, District of Columbia, for the purpose of putting a team of horses used by said defendant in said employment, in said stable; that in said stable there was a loft or store-room where the said feed for the said horses was kept, and that there was a certain hole or opening through which said feed passed from said loft or store-room to the stable below; and it then and there became and was the duty of the said defendant to have the said hole or opening so guarded that the bales of hay in the loft above would not pass through said hole or opening and fall upon those engaged in the performance of their duties in the stable below, yet the defendant wholly neglecting its said duty in that regard, then and there, and while the plaintiff was engaged as aforesaid in said stable in the performance of his duty as a laborer as aforesaid, and in pursuance of the instructions and directions of the defendant as aforesaid, did not protect the said hole or opening in any way whatsoever, but wholly disregarding its said duty in the premises, carelessly and negligently allowed a bale of the said hay to fall through the said hole or opening upon the said plaintiff who was at work in the stable below, and who was wholly ignorant of the said defendant's carelessness and negligence, being otherwise in the ex-
5 ercise of due care and diligence on his part, in consequence whereof, said plaintiff was struck by the said bale of hay on the side of his head and neck and shoulder, and on the lower portion of his back, and by reason of the said bale of hay striking the said plaintiff as aforesaid, he then and there suffered a sever shock to his whole system, was severely bruised, maimed about his body, besides suffering severe pain and sustaining a permanent internal injury in his ear, head and back, causing permanent deafness in his ear, and was permanently injured in the back and spine, and was permanently injured internally, and was otherwise greatly hurt and injured to such an extent that he is, and for the remainder of his life will be unable to pursue any manual or mental labor, and he has suffered great bodily pain and mental anguish, and will continue so to suffer so long as he shall live, and he has been put to great expense

in and about endeavoring to be cured of his said injury and has expended large sums of money in procuring medical attention.

Therefore, and by reason of the facts in the premises, he has been damaged in the sum of Fifteen Thousand Dollars ($15,000), which amount he claims, besides the costs of this suit.

The plaintiff, Abraham Brown, sues the defendant for that whereas the defendant was at the time of the commission of the grievances hereinafter mentioned, a body corporate duly incorporated under and by virtue of the laws of the State of Pennsylvania, and for a long time prior thereto was, and still is such a body corporate,

6 and whereas it then was, and still is the business of the said defendant, among other things, to deal in oils in the City of Washington, District of Columbia, and to that end owned or occupied a certain stable in the City of Washington, District of Columbia, for the purpose of sheltering and housing certain horses belonging to the said defendant and used by the said defendant for the purpose of carrying on its said business in said City of Washington, District of Columbia, and whereas, heretofore, to wit, on or about the 8th day of February, A. D., 1904, while the defendant was carrying on the said business as aforesaid in the manner aforesaid, the plaintiff was then and there in the employment of the said defendant as a laborer, and was then and there required and directed by the said defendant, in the performance of his duty as a laborer, as aforesaid, to enter said stable of the said defendant in the said City of Washington, District of Columbia, for the purpose of putting a team of horses used by said defendant in said employment in said stable; that in said stable there was a loft or store-room where the said feed for the said horses was kept, and that there was a certain hole or opening through which said feed passed from said loft or store room to the stable below; and it then and there became, and was the duty of the said defendant to have the said hole or opening so guarded that the bales of hay in the loft above would not pass through said hole or opening and fall upon those engaged in the performance of their duties in the stable below without some warning or notice to those below; yet the defendant wholly neglecting its said duty in this regard, then and there, and while the plaintiff

7 was engaged as aforesaid, and in pursuance of the instructions and directions of the defendant as aforesaid, did not protect the said hole or opening in any way whatsoever, but wholly dirregarding its said duty in the premises, carelessly and negligently allowed a bale of the said hay to fall through the said hole or opening upon the said plaintiff who was at work in the stable below, and who was wholly ignorant of the said defendant's carelessness and negligence, being otherwise in the exercise of due care and diligence, on his part, in consequence whereof, said plaintiff was struck by the said bale of hay on the side of his head and neck and shoulder, and on the lower portion of his back, and by reason of the said bale of hay striking the said plaintiff as aforesaid, he then and there suffered a severe shock to his whole system, was severely bruished, maimed about his body, besides suffering severe pain and sustaining a permanent internal injury in his ear, head and back, causing permanent deafness in his ear, and was perma-

nently injured in the back and spine and was permanently injured internally, and was otherwise greatly hurt and injured to such an extent that he is and for the remainder of his life, will be unable to pursue any manual or mental labor, and he has suffered great bodily pain and mental anguish and will continue so to suffer so long as he shall live, and he has been put to great expense in and about endeavoring to be cured of his said injury and has expended large sums of money in procuring medical attention.

Therefore, by reason of the facts in the premises, he has been damaged in the sum of Fifteen Thousand Dollars ($15,000), which amount he claims, besides the costs of this suit.

8 The plaintiff, Abraham Brown, sues the defendant for that whereas the defendant was at the time of the commission of the grievances hereinafter mentioned, a body corporate duly incorporated under and by virtue of the laws of the State of Pennsylvania, and for a long time prior there to was, and still is such a body corporate, and whereas it then was, and still is the business of the said defendant, among other things, to deal in oils in the City of Washington, District of Columbia, and to that end owned or occupied a certain stable in the City of Washington, District of Columbia, for the purpose of sheltering and housing certain horses belonging to the said defendant and used by the said defendant for the purpose of carrying on its said business in said City of Washington, District of Columbia, and whereas, heretofore, to wit, on or about the 8th day of February, A. D. 1904, while the defendant was carrying on the said business as aforesaid in the manner aforesaid, the plaintiff was then and there in the employment of the said defendant as a laborer, and was then and there required and directed by the said defendant, in the performance of his duty as a laborer as aforesaid, to enter said stable of the said defendant in the City of Washington, District of Columbia, for the purpose of putting a team of horses used by said defendant in said employment in said stable; that in said stable there was a loft, or store-room, wherein the defendant stored and kept hay and feed for its said horses, and that there was a certain hole or opening through the floor of the said loft or store-room, through which the said hay and feed was sometimes passed

9 from said loft or store-room to the stable below by employees of the said defendant, whose duty it was to place the said hay and feed in the respective stalls of the stable below, and it then and there became and was the duty of the said defendant to not only have the said hole or opening so guarded that the hay and feed in said loft or store-room could not pass through said hole or opening and fall upon or injure those engaged in the performance of their respective other duties in the stable below, but that it became and was also the duty of the said defendant to not permit the said hay and feed to be thus passed through the said hole or opening without proper warning, or timely notice to those employed in the stable below, and it also became and was the duty of the said defendant to exercise such care and diligence in the matter of employing reasonably skillful, competent and careful employees to so handle the said hay and feed in transmitting the same from the loft or store-

room above to the stable below, as not to endanger the lives and limbs of those employed in the stable below; and it then and there became and was the duty of the said defendant to give its employees, engaged in handling or placing the hay and feed as aforesaid, as well as those who were employed in the stable below, such proper and necessary instructions with respect to the dangers of passing the hay and feed through the said hole or opening, and the performance of their respective duties, as to prevent injury and danger to the lives and limbs of the employees engaged in the stable below; yet the defendant, wholly neglecting its said duties in this regard, then and there and while the plaintiff was engaged as aforesaid, and
10 in pursuance of the instructions and directions of the defendant as aforesaid, did not protect the said hole or opening in any way whatsoever, or do any of the other duties that it was called upon to discharge in the premises, but wholly disregarding its said duties in the premises, did so carelessly and negligently allow a bale of the said hay to fall, or to be passed, or thrown through the said hole or opening, without any notice or warning or signal, or instruction of any kind to plaintiff or by any of its said employees, so as to fall with great force upon plaintiff, who was at work in the stable below, and who was wholly ignorant of the said defendant's carelessness and negligence, and while exercising due care and diligence on his part, and in consequence of such negligence and carelessness on the part of the defendant, plaintiff was struck by the said bale of hay on the side of his head and neck and shoulder, and on the lower portion of his back, and by reason thereof, he then and there suffered a severe shock to his whole system, was knocked down, severely bruised and maimed about his body, and by reason thereof suffered severe pain and sustained a permanent internal injury to his ear and hearing, and his head, and was permanently injured in the back and spine and was otherwise greatly and internally hurt and injured to such an extent that he is, and for the remainder of his life, will be unable to pursue any manual or mental labor, and he has suffered great bodily pain and mental anguish and will continue so to suffer as long as he shall live, and he has been put to great expense in and about endeavoring to be cured of his said injury and has expended large sums of money in procuring medical attention.

11 Therefore, by reason of the facts in the premises, he has been damaged in the sum of Fifteen Thousand Dollars ($15,000), which amount he claims, besides the costs of this suit.

W. GWYNN GARDINER,
Attorney for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

W. GWYNN GARDINER,
Attorney for Plaintiff.

12 *Plea.*

Filed March 25, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 47936.

ABRAHAM BROWN, Plaintiff,
vs.
THE STANDARD OIL COMPANY, a Corporation, Defendant.

And now comes the defendant in the above-entitled cause, by its attorney, and for plea to the plaintiff's amended declaration filed herein, and each and every count thereof, says it is not guilty in manner and form as alleged.

A. LEFTWICH SINCLAIR,
Attorney for Defendant.

Joinder of Issue.

Filed March 26, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 47936.

ABRAHAM BROWN
vs.
THE STANDARD OIL COMPANY, a Corporation.

The plaintiff joins issue on the Plea of the Defendant to the Amended Declaration.

W. GWYNN GARDINER,
Attorney for Plaintiff.

13 *Memorandum.*

May 20, 1907.—Verdict for plaintiff for $6500.

Supreme Court of the District of Columbia.

FRIDAY, *May* 31, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 47936.

ABRAHAM BROWN
vs.
THE STANDARD OIL CO.

Upon hearing the defendant's motion for a new trial it is considered that the same be, and hereby is overruled, and judgment on verdict ordered:

Therefore it is considered that the plaintiff recover against the defendant the sum of Six thousand, five hundred dollars ($6500.) with interest thereon from this date, being the money payable by it to the plaintiff, by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals of the District of Columbia from the judgment of the Court in this cause and the penalty of the bond for costs on said appeal, to act as
14 a Supersedeas, is hereby fixed in the sum of Eight thousand dollars ($8000.).

Memoranda.

June 17, 1907.—Appeal bond filed.
June 28, 1907.—Bill of Exceptions submitted to Court.

Supreme Court of the District of Columbia.

MONDAY, *July* 15, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 47936.

ABRAHAM BROWN, Pl't'f,
vs.
STANDARD OIL COMPANY, Def't.

Now comes here the defendant by its Attorney and prays the Court to sign, seal and make a part of the record, its bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

15 *Bill of Exceptions.*

Filed July 15, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 47936.

ABRAHAM BROWN, Plaintiff,
vs.
STANDARD OIL COMPANY, Defendant.

Be it remembered that, at the trial of this cause, before Mr. Justice Wright and a jury duly empaneled and sworn to try the issues joined between the plaintiff and the defendant herein, the plaintiff, to maintain and prove the issues on his part joined, introduced as a witness Charles H. Hunt, who testified in substance that he was a

travelling salesman, employed by the S. F. Bowser Company; that up to December, 1904, he was employed by the Standard Oil Company; that he entered the employ of the Standard Oil Company in 1899; that he was acquainted with John Coleman, an employee of the Standard Oil Company; that Coleman was with said Company when he (Hunt) went to work for the Company and was working for the Company when he (Hunt) left it in December 1904; that to the best of his knowledge said Coleman is still in the employ of the Standard Oil Company; that he is acquainted with Abraham Brown, the plaintiff, and has known him for about two years; that the plaintiff was a driver for the Standard Oil Company in 1904; that he knew when the plaintiff got hurt; that he does not know when he
16 was hurt, but that he understands it was in February, 1904; that the plaintiff's duties while he was with the Standard Oil Company were to deliver oil and collect for the same; that he drove horses and the horses were kept in the Company's stable in the rear of the plant at the northwest corner of Half and K Streets, southeast, this city; that the stable was at one end of the lot, and the offices of the Company were at the other end, on I Street; that he was not very familiar with the stable, but went in it perhaps a half a dozen times; that the stable was between fifty and sixty feet long and contained about nineteen or twenty stalls; that the horses stood in the stable with their backs toward each other; that there was an aisle between the horses, about ten to twelve feet wide, that ran the whole length of the stable; that there was a door at each end of the stable; that the ceiling of the stable was between sixteen and eighteen feet above the floor where the horses stood; that the ceiling was not as high as the ceiling in the court room; that there was an opening in the ceiling of the stable at about the middle of the stable, over the aisle, about four feet and a half, something like that, perhaps a little larger—that the opening was square; that when he saw this hole it was always open; that one standing in the stable could look up through the opening and see the roof, but could not see the sky; that he did not know for what purpose the hole or opening was used; that he never saw it used for any purpose; that the stable was lighted with coal-oil lamps, but he did not know how many; that he was never in the stable after dark; that he worked in
17 the office; that no instructions, to his knowledge, were given to him or to any other person employed by the Standard Oil Company relative to the operation of the stable; that John Coleman was night watch, and he fed the horses, mornings and evenings; he had to bed the horses and put feed in the mangers and troughs; that Mr. Parsells had charge of this branch of the Standard Oil Company; that Mr. Parsells was what was known as the superintendent of this branch and had charge of the stable and the office; that he was acting as superintendent when the plaintiff was injured; that Mr. Parsells was acting as superintendent when he, (Hunt) went to work for the Company and continued to act in that capacity to the time of the accident; that John Coleman was the night watchman and fed the horses when he, (Hunt) entered the employ of the Company and was performing the same duties on the date of the

accident; that he saw Coleman the evening of the accident, after the accident occurred, but did not know how soon afterwards; that he did not know just exactly when the accident occurred, but supposed it was very soon after, that he came into the office very soon after the accident, to tell us that he had dropped a bale of straw on Mr. Brown, and that he wanted us to telephone for an ambulance; that he saw Brown after the accident; that he did not know when the drivers were compelled to leave the stable in the morning; that they got in at different hours; that the time they would return would depend on what time they got through; that the hours of their return were longer in winter than in summer; that in February, I judge,
18 some of the drivers got in at three o'clock, and others got in about five or six, and maybe some would not get in until after that; that some might not get in until after nine, but that was an unusual case; that to the best of his recollection, Brown would turn in a little late; that he judged Brown generally arrived at the stable sometime about five o'clock; that he did not know positively; that Brown was brought into the office after he was injured, the day of the accident, by three of four of the drivers—Mr. Malone, Mr. Heffner, and Mr. Canavan; that Brown looked to be a man that was suffering very great pain; that he was brought in bodily by these drivers; we put him on the floor and he stayed on the floor in the neighborhood of half an hour; we then put him in the ambulance and he was carried to Providence Hospital; Brown seemed to be in great pain and was making an outcry at the time we moved him or put our hands on him; he seemed to be suffering pain across his stomach and held his hands over there, in that manner (indicating); he breathed a little hard; that Brown was brought into the office about six o'clock—in that neighborhood; that he did not know how long before that the accident happened.

On cross-examination this witness further testified that at the time of the happening of the accident Brown had been regularly employed by the defendant about two weeks; that he could not say positively; it may have been a little longer or a little less time, I do not know; that Brown was a tank wagon driver; that he delivered oil and collected for the deliveries; that he also had to put his horses in the stable and clean them off; that Coleman was night watchman
19 around the plant and it was his duty to feed the horses and provide bedding for the horses. Hereupon witness was handed a plat and asked to state whether it correctly represented the stable, and after examining the plat stated that it showed the stable—that it looks to be a plan of it. The witness further testified that the hole leading from the stable into the loft through the ceiling was about four feet square, and perhaps more; that he had been in the loft of the stable and passed through it several times; that the hole or opening was protected by a board fence around the hole, a plank fence, which extended three feet and a half or four feet above the floor of the loft; that he did not know what the hole was used for; that I think I could see the hole or opening when I was walking in the stable below, in the aisle between the stalls; that he first learned of the accident in the neighborhood of six o'clock on the

day the accident occurred, through Coleman, when he came to the office; that Coleman stated when he reached the office that he had dropped a bale of hay or straw on Brown, and he wanted us to telephone for an ambulance; that we telephoned to the Emergency Hospital and they told us that the ambulance was out and they did not know when they could get one for us, but they suggested that we call up the Fifth Precinct, which we did, and the Fifth Precinct sent one down to us; that Coleman stated the circumstances under which he dropped the straw on Brown about the time the ambulance was telephoned for; that he, (Coleman) stated that he dropped the bale of straw down through this hole in the stable and hit Brown with it; Coleman said he called to Brown before he threw the straw down through the hole; that a short time after Brown was
20 hurt he was sent to Providence Hospital and remained there about a month, probably; that Brown came back to work for the defendant about a month and a half after the accident.

And thereupon to further maintain the issues on his part joined, the plaintiff produced as a witness JOHN H. COLEMAN, who testified that he is in the employ of the defendant; that he has been employed by the defendant nine years this coming November; that at the time of the accident to Brown his duties were stable duties; that he was night watchman and it was his duty to feed the horses twice a day, night and morning; that he has been night watchman and has been feeding the horses in the night and in the morning at the stable in question for nearly nine years; that he was a driver for the defendant when he was first employed by it and that he took up the duties of night watchman the first of February after he went to work for the defendant; that he was night watchman at the time of the accident to Brown and continued to act as night watchman at the same stable until the first of July last; that he is acquainted with Brown; that Brown had been working for the defendant possibly about two months or more before the accident; that he got acquainted with him when he first came there; that the drivers had to leave the stable about six o'clock in the morning and they would return usually after they got through with their route; they had no regular time to return; it seemed like a man had a territory to serve, and after he served that territory his day's work was over, and sometimes it would be early and sometimes late; that no man had any certain time to get in; he would get in after he did his work; Brown
21 would get in sometimes after dark, and sometimes before dark; that on the evening of the accident Brown was in the stable when he, (Coleman) got there; that he did not know how long Brown had been there; that he, (Coleman) was not there when Brown arrived; that Brown was in the stable when he, (Coleman) got there that day.

And thereupon the following questions were asked the witness, and he gave the following answers:

Q. Do you remember a hole in the center of the ceiling of that stable? A. Yes, sir, if you call it a hole. I remember it.

Q. What use, if any, did you make of that hole? A. For putting down straw for bedding the horses.

Q. How long had you done that before Brown was hurt? A. Putting down straw?

Q. Yes. A. I used that ever since I had been feeding.

Q. Ever since you had been feeding? A. Yes, sir.

Q. Do you know Mr. Parsells? A. Yes, sir.

Q. Do you know whether or not Mr. Parsells knew that you were using that hole for that purpose? A. I think so; I think he did.

Q. What was Mr. Parsells? What were his duties? Do you know what position he held? A. I don't know whether he was superintendent or manager.

Q. He was superintendent or manager? A. I don't know whether he was, but I think——

Q. From whom did you get your orders? A. Mr. Parsells.

22 Q. From Mr. Parsells. Did you drop the bale of hay down on Brown? A. Yes, sir.

Q. Did you ever recieve any instructions from the Standard Oil — as to what use you should make of that hole, from Mr. Parsells or from anybody else? A. No, sir; I do not think I did—if you call it a hole. It was well protected with wainscoting partition around it, with a crown—I wouldn't know hardly what to call it, but a half round crown from the wainscoting, and about a half inch high.

Q. That is up in the ceiling—up in the loft? A. That is on the floor.

Q. That is up in the ceiling there; there is nothing above? A. That is on the floor above. There could not anything fall down through there unless it was absolutely turned up and thrown down through there.

Q. Yes; it was only what you threw down that went down there? A. Yes, sir.

Q. Was there any cover over that hole, at the top? A. Yes, there was what I would call an air shaft, with lights, that is, window lights, to let in air.

Q. How far was that above this wainscoting that you speak of? A. Why, that is about eleven feet.

Q. Eleven feet above the wainscoting? A. Yes, sir.

Q. I mean there was nothing over the top of the wainscoting? A. No, sir, nothing over the top of it; that was not covered up with anything.

On cross-examination the witness further testified that Brown reached the stable on the day of the accident before he did; that he saw him in the stable when he, (Coleman) arrived, and spoke

23 to him, and then he, Coleman, proceeded up the steps into the stable loft; that when he, (Coleman) reached the stable that day it was not dark; that he was positive it was not dark; that when he went up into the loft he usually had his hay weighed up for every horse in individual batches; that he did not throw the hay down through this hole or opening; that every horse had a crib or rack, with a chute connected with the rack; that he would keep

one feed up there, weighed in advance, and as soon as he got one day around, he would go back and weigh up a batch for the next day; that the first thing he did when he got up there was to drop this hay down to the horses, through the chutes, leading into the troughs, into the racks, rather; that every horse had a chute that you put the hay down through, with a wainscoting all around, just the same as the opening in the middle; that upon reaching the loft on the day of the accident, after speaking to the plaintiff, the first thing he did was to throw down the hay for the horses, through the chutes leading to the racks; that the next thing he did was to get a bale of straw from the north end of the bin; that we had a feed bin adjoining this hole, as you went out in the middle of the stable; that the hole was protected on one side by the bin; that he got a bale of straw, and he called out to Mr. Brown to look out below.

And thereupon the witness was asked the following questions and made the following answers thereto:

Q. Before you threw it (the straw) down? A. Yes, sir, after I got it in condition to throw it down.

Q. Go on. A. Mr. Brown said "all right," and I proceeded
24 then to raise the bale of straw up on the wainscoting, and just as I was about to let it go, just as I lost my reach on it, he appeared right under the hole, out of a stall, and I hollered out excitedly, but he seemed to draw himself right up, and of course I saw the bale when it struck him, and I hurried downstairs, then.

Q. When you hollered you had lost hold of the bale of straw? A. Yes, sir.

Q. And it was then too late to hold it? A. Yes, sir; but I had warned him before, as I did every man that ever came there to work.

Q. Was it your custom to holler before you dropped anything through that hole? A. Yes, sir, it was my custom to holler, always.

Q. Before throwing down the hay? A. Yes, sir, before throwing down a bale of hay.

Mr. GARDINER: I object, and move to strike out that answer.

The WITNESS: Well, that is what I did, to give warning to everybody around.

The COURT: Go on.

By Mr. SINCLAIR:

Q. Tell us how high you had to lift that bale of straw in order to throw it down through that opening? A. I had to raise it about three feet and a half.

Q. Then this protection or fence around that hole which projected above the floor of the loft, was about three feet and a half high? A. Yes, sir.

25 Q. I wish you would be good enough to indicate just about how high that box was. You can indicate with reference to this railing here. A. About as high as this (indicating on railing). Just about as high as that. I do not think there was two

inches difference. I measured by myself, by my body. It was higher than this (indicating gate in the railing).

Q. It was as high as this post? A. Yes, sir.

Q. Was it a round box or a square box? A. It was a square box, above the floor.

Q. Then if this gate in this railing was opened, here, (indicating) it would give an idea of the shape of that box? A. Yes, sir.

Q. And it was about this high? A. Yes, sir.

Q. Now tell us exactly what you hollered down to Mr. Brown before you threw that down? A. I hollered out to him to look out below.

Q. How loud did you holler? A. Loud enough for him to answer me "All right."

Q. He answered you "All right?" A. Yes, sir.

Q. And you are positive that he said "All right?" A. Yes, sir; and I didn't have any fear of hurting him after he answered me.

Q. Now state whether or not, prior to that time, you told Brown about that hole, and what it was used for? A. Yes, sir; I stated to Mr. Brown——

Q. When? A. When he first came there, like I would any other new man. Every new man that came along I told him about the hole and what it was used for.

26 Q. Yes. A. Not because there was any imminent danger there, there was nothing dangerous about that hole at all, because it was used to throw down straw; and I hollered always before I would throw anything down. I had a knack of hollering if I would throw anything down, and I would holler even if I threw down only a little dust, to look out below. I had no way to get dust out of that place. I would carry the dust to the north door to sweep it out.

Q. Tell us as near as you can what you said to Brown about this hole at the time he started to work for the Standard Oil Company? A. At the time he started to work?

Q. Yes. A. Oh, I pointed him to the hole.

Q. You pointed out the hole to him? A. Yes, sir, I pointed out the hole, and told him what it was used for.

Q. What did you tell him that it was used for? A. To throw down straw, sometimes, and any time that I hollered, to look out below; and I think any man that ever worked there will tell you the same, that I have told him what that hole was for.

Q. The hole was used regularly for the purpose of throwing down straw for bedding for the horses, was it not? A. Yes, sir; that is what they used it for.

Q. And how long had you used it for that purpose? A. I used it all the time I was there.

Q. All the time you were there? A. Yes, sir. Hundreds of men had worked there while I used it, and never got hurt.

Q. Now, there was an aisle running between the stalls in that stable, was there not? A. An aisle?

27 Q. An aisle or passage-way? A. An aisle, yes, sir.

Q. And how wide was that aisle? A. I think it was about twelve feet wide.

Q. And how large a hole was this, or opening, through which you threw the straw on that occasion? A. As well as I can think, it was about four and a half feet; a square hole.

Q. And it was in the middle of the aisle? A. Yes, sir; it was in the middle of the aisle.

Q. Yes. A. And about the middle of the stable.

Q. How far was that hole from the stalls in which Brown put his horses? A. That was very close to the stall.

Q. Right close to the stall? A. Yes, sir; not exactly opposite, but the beginning of the hole was almost between his stall and the next stall joining him.

Q. State whether or not a person could come out of those stalls without placing himself under the hole? A. Oh, yes, sir.

Mr. GARDINER: I object to that, if your Honor please.

The COURT: Objection overruled.

The WITNESS: A person could pass from stall to stall without being under the hole.

By Mr. SINCLAIR:

Q. Was not the hole three feet or more from the stall in which the horses were? A. Yes, sir, about three feet.

Q. I wish you would look at that and state whether or not it correctly represents that stable—the interior of it, and the loft
28 (handing witness a plat). A. (Indicating on plat). This is the opening. This would be the north end, the entrance. This would be the feed-room. This would be the box stall. This would be the feed-room and this is the box stall. These are Mr. Brown's two stalls.

Q. These two here (indicating)? A. Yes, sir.

Q. You think that is a fair representation of that part of the stable? A. Yes, sir, very much so. That hole is right in the center, I think, about the center, half way between end and end and half way across this aisle.

Q. How did you enter that stable? A. I entered here; this is the entrance.

Q. And you saw Brown? A. Yes, sir.

Q. Where was Brown? A. Here in these stalls tending to his horses.

Q. And did you go up these steps when you entered the loft (indicating on plat)? A. Yes, sir, up these steps.

Q. Are these the chutes that you mean through which you threw down the hay? A. Yes, the hay. They projected up about two feet. They wasn't as high as the chute around here (indicating).

Q. The hay dropped down into the trough in the horses' stalls, did it not? A. They were half round—the chutes for the hay; and they have a partition in the middle, and on each side of that partition you feed two horses.

Q. I will ask you also to state whether that represents the loft as you recollect it (indicating). A. This being the chute in the loft?

Q. Yes. A. Yes, sir, that is.

29 Q. Is that the way the box projected above the floor? A. Yes, sir, with that crown on this partition. That is just the way it was.

Q. You say it was not dark at the time you saw Brown in this stable on the date of the accident? A. No, sir.

Q. You had frequently seen Brown in that stable in the day time, had you not? A. Yes, sir.

Q. About how many times would you say that you saw Brown in this stable prior to the accident, in the daytime? A. Well, I wouldn't like to say that, but——

Q. About how many times? I do not want you to be exact about it; I do not expect you to be exact. A. I was always there in the morning and in the evening. Sometimes these drivers would come in before I got there and take care of the horses, and in some other cases they would be late and I would be there and sometimes most of them would come after I got there.

Q. Where was Brown at the time you first pointed out this hole to him and explained to him the purpose for which it was used? A. In view of the hole; he was in view of the hole.

Q. About what time of day was it? A. Oh, I don't remember exactly what time it was. Brown was there before he was employed regularly. He was there on a kind of extra work; done some work and then he was off, sometime before he got regular work there.

Q. Then he was employed there temporarily before he was regularly employed? A. It seemed to me as though he was employed, but it didn't seem we had a regular place for him when he
30 first came there. He just substituted until he got a regular job.

Q. And he was regularly employed, according to your recollection, about two months before this accident? A. Yes, sir.

Q. Before he was regularly employed, did he not frequently come around the stable, at the time he was temporarily employed there? A. Yes, sir, came there regularly mornings and didn't have anything to do and he would go back again.

Q. That was daytime, was it not? A. Yes, sir.

Q. Was he regularly employed when you say you warned him about this hole and explained to him what it was used for? Was not that daytime? A. Yes, sir, of course, daytime.

Q. You are positive that that was daytime? A. Yes, sir.

Q. Anybody entering the stable in the daytime could have seen the hole in the ceiling, could he not? A. Yes sir, by looking up. I didn't usually throw down any stuff at night—dark. Always pretty well through when dark come.

Q. Could a bale of straw have gotten down through that hole without somebody lifting it up? A. No, sir, impossible.

And thereupon on redirect examination the witness gave further testimony as follows:

By Mr. GARDINER:

Q. You say you saw Brown around there during the
31 daytime. What time of day did you see him there? A. Mr. Brown used to come in the mornings, work time—early in the mornings.

Q. He was there before six o'clock, before the men went out? A. Yes, sir. If any men were in the place sometimes he would go back, but didn't have employment.

Q. So that he would come in the mornings? A. That was, perhaps, a couple of months before he got work there.

Q. That was in the morning, however, was it not, that he would come there and they got the teams out? A. Yes, sir.

Q. And he was not there during the day except when the teams were there in the morning being taken out, was he? A. I don't think he was. I wasn't there during the day myself.

Q. You were not there during the day yourself? A. No, sir.

Q. Did you ever throw any hay through this place with the exception of early in the morning or late in the evening? A. No, sir, I didn't throw any hay down at all. I threw straw down in the evening usually.

Q. You did not do that in the morning at all? A. No, sir.

Q. Now, you say you have always instructed all of the drivers or new men when they came in to look out for this hole, that you threw hay or straw through it? A. Yes, sir.

Q. Will you tell me some of the men to whom you have given this instruction? A. Yes, sir.

Q. Give me some of the names. A. Mr. Malone was
32 one.

Q. Mr. Malone? A. Yes, sir. Joe Heffner.

Q. Who else? A. Why, Mr. Guiles.

Q. Who else? How about Duffy? Did you tell him? A. Yes, sir, I told him.

Q. How about Barbour? Did you tell him? A. Yes, sir.

Q. You told them all? How about Taylor? Did you tell him? A. Taylor? Yes.

Q. How about Schoenthal? A. Oh, yes.

Q. You told them all? A. Yes, sir.

Q. So that when these men came there you gave them instructions about the use of this hole? A. Yes, sir. They all knew when I was going to throw down anything; I always alarmed them before I threw down anything and they all knew it.

Q. But you instructed them before they came there that that hole was used for that purpose? A. Yes, sir.

Q. Why did you give these instructions to these men when they came there to work? A. Well, because a man was green about the place; he wouldn't be warned of it, and something might fall on him, or something like that.

Q. You knew that it was dangerous unless you did holler? A. Yes, sir, unless you warned him.

Q. And you knew that unless you did warn them when they came there that they were liable to be hurt? A. Yes, a man is liable to get hurt in case of not telling him, throwing anything on him and not telling him, of course.

Q. You knew that Brown was hard of hearing, did you
33 not? A. Yes, sir, he seemed to be sometimes.

Q. Sometimes hard of hearing? A. Sometimes.

Q. Brown was never in the stable during the day, you say? A. I don't know. I say I was never there in the day.

Q. You have never seen him during the day? A. He was there in the morning and evening.

Q. I mean before six in the morning and late in the evening. A. Sometimes after six he was there. It didn't seem any compulsion that a man should be there promptly at six; some were late sometimes; some got in earlier.

Q. They were compelled to leave by six o'clock in the morning, were they not? A. I don't know. Some left after six, according to a man's work; every man seemed to have a territory and they were working to their own interest.

And thereupon the witness further testified on recross-examination as follows:

By Mr. SINCLAIR:

Q. Now, in addition to these men that you told about this hole, did you tell Brown about it? A. Yes, sir.

Q. At the time he was regularly employed by the Company? A. Yes, sir.

Q. When you say that you regarded this hole as being dangerous, you do not mean to be understood as meaning that it was dangerous without some human intervention, do you?

Mr. GARDINER: I object to that, if your Honor please. The language was very plain, I submit. I asked him that very question and he said he did.

The WITNESS: I said dangerous in throwing down under
34 possible circumstances of anybody getting hurt; unless somebody took up something and threw it down, that is what I meant by that.

And thereupon to further maintain the issues on his part joined, the plaintiff produced as a witness one JOSEPH HEFFNER, who testified that he was employed by the Standard Oil Company in February, 1904, as a tank wagon driver; that he had no other duties; that he was acquainted with Abraham Brown, the plaintiff, and that Brown was employed by the Standard Oil Company while he, (Heffner) worked for it; that he remembers Brown being hurt, but when it was he was unable to remember; that he was employed by the Standard Oil Company altogether about four years and that he was with the Company about two years before Brown was hurt; that his duties were the same as those of Brown; that his duties about the stable in the morning were cleaning horses and harnessing them; that he was under instructions to leave the barn in the morning at six o'clock; that in the month of February, about the time Brown was hurt, six o'clock was dark; that he, (Heffner) returned in the evening at different times, four o'clock, five, six—different hours; that in winter more oil was usually consumed than in summer and it would take a little longer for the drivers to deliver it; that in summer you could do it in about half the time; about half

or three-quarters of the time; that the men would return to the barn later in the winter; that Brown returned in the neighborhood of half past five or six o'clock in the evening; that it was then dark
35 weather, he judged; that the stable, he judged, was about 50 feet long and the ceiling was about 15 feet; that there was a hole in the center of the ceiling, which was used for throwing straw down through for bedding for the horses; that he never had any instructions as to what that hole was used for; that he knew John Coleman, the night watchman.

And thereupon the witness was asked this question by Mr. Gardiner:

Q. State whether or not any instructions were given you when you went to work for the Standard Oil as to the use of that stable or the use of that hole?

To which question the witness gave the following answer:

A. Well, I had no instructions at all, only that the feed was thrown down there—to look out below.

And thereupon the witness further testified that the stable was lighted very poorly; that there were not enough lights there—one at each end—one or two little hung lamps, or lanterns, which reflected at each end of the stable; that in the month of February, in the morning, you could distinguish a person in the middle of the stable; that he could see how to harness his horses without feeling; that the two lights in the stable, one at each end, were stationary; that there was one light at each end always; that these lights were never taken down, to his knowledge; that he was never informed as to what the hole was used for; that he thought it was more of a ventilator than anything else, but it was used for throwing
36 straw through; that he saw straw thrown down through the hole quite often; that the straw was also sometimes thrown out of the north door, that it was usually thrown both ways.

Q. Do you know for what purpose that hole was used? A. Well, I was never informed; I thought it was more of a ventilator than anything else, but it was used for throwing straw through.

On Cross-examination the witness further testified that the straw was thrown down through this hole or opening by Mr. Coleman; that Coleman always hollered "Look out," when he, Heffner, was there; that he, Heffner, has been up in the stable loft and knew about the box that was around the hole and projected above the floor of the loft; that the box or fence around the hole was about three feet high, about three and a half feet, about six feet each way.

On Re-direct examination the witness further testified that the horses were always supposed to be fed before he reached the stable in the morning; that sometimes they would be eating for awhile after he got there; that when he turned in early the feed would not be ready for the horses, but when he got in late the feed was usually in the stalls ready for the horses; that if a man got in at six o'clock "I think they would be fed;" that he did not know about all of the horses being fed by six o'clock; one man had all to do;

that he could not say whether or not Brown was ever in the stable while straw was being thrown down through that hole; that he could not remember one way or the other as to that.

37 And thereupon to further maintain the issues on his part joined the plaintiff produced as a witness one WILLIAM HEFFNER, who testified that he was employed by the Standard Oil Company in February, 1904, and had been so employed about seven years; that he was clerk and cashier throughout the whole time of his employment; that he is acquainted with the plaintiff; that the plaintiff, he thinks, was injured sometime in February, the 8th of February, 1904; that he, Heffner, paid the men; that he paid Brown, in fact he paid all the men; that Brown had been employed by the Company, say two weeks—something like that—before the accident; that Brown had to sell the oil; he had to take care of his team and deliver oil in the streets and stores; that he knew John Coleman, the night watchman; that Coleman's duties were as stableman; that the drivers were supposed to leave the stable about six o'clock in the morning; that it was dark then, in the month of February; that, after they left, they returned quite frequently during the winter months, to the plant but not to the stable; that when they returned to the stable at that time of the year, it was dark or nearly dark; that they were late returning to the stable that month because there was more demand for oil that season of the year; that he did not know what time Brown left the stable in the morning, but he was supposed to leave with the rest of them; that he, Heffner, does not know what time Brown got in in the evening; that he was supposed to turn in after he had served his route; that sometimes he, Heffner, would not get Brown's money until the morning; Q. Why was that? A. Well, they would

38 sometime- come in so late that I had to leave the office before they turned in their money; that he would leave the office between six and six-thirty; that he saw Brown the day of the accident, after the accident, in the office; that he was carried in; that the accident occurred about six o'clock, a little after, if anything; that he first saw Brown in the office, after the accident; that he saw them bring Brown in; he was badly injured and was making an outcry while they were carrying him in; after they laid him down he seemed to be more easy; he made an outcry whenever they handled him; that Brown was in the office about a half an hour; that he, Heffner, does not know where Brown was taken, after the accident; that Brown's hearing prior to the accident was not very good; asked as to whether he knew what the hole in the center of the stable was used for, the witness stated "Well, no, I really don't know. It was supposed to be used for throwing down the feed, but of course we were two or three hundred feet away from the stable. I was employed out at the other end."

Q. You do not know? A. No.

Q. Mr. Heffner, were there any rules ever given you or anyone else to your knowledge about the use of that hole in the stable? A. Not to my knowledge, no sir.

And thereupon the plaintiff, to further maintain and prove the issues on his part joined, produced as a witness CHARLES DIGGS, who testified that he was employed by Mr. Guiles who
39 worked for the Standard Oil Company, in the fall of 1903, or something like that; that he was in the stable of the defendant in the fall of 1903; that he knew of a hole being in the ceiling of the stable; that he was never injured by a bale of hay coming down through that hole; that he was never injured in the stable, but was injured on the outside, coming out; that he, Diggs, did not tell Mr. Gardiner the day before that he was hurt on the foot by a bale of hay being thrown through that hole.

And thereupon the plaintiff, to further maintain and prove the issues on his part joined, took the witness stand himself and testified that his name is Abraham Brown; that he knows John Coleman and has known him since he worked for the defendant; that he, the plaintiff, worked for the defendant about a week before he was injured; that he was injured about the 8th of February, 1904; that he was a driver for the defendant and seller of oil and collected money; that he had to report at five o'clock in the morning, get his horses out, hook them up, and at six o'clock he had to be at the yard; that he returned to the stable in the evening at no definite time; any time we got through; that he generally got through with his work at six or seven o'clock; that he happened to have a very extensive route; that he had the entire southeast part, Congress Heights, Anacostia, Good Hope and Twining City; that as a new man he couldn't very well locate his territory at first; that it took him generally longer than all the other drivers; that he generally turned in at dark, but sometimes after seven o'clock; that it was always dark in the morning when he left the stable at six
40 o'clock; that he never returned to the stable in the evening before dark; that sometimes we returned to get another supply of oil, but never drove in the yard; always stood on the front street, never drove in the yard; that he was never in the stable of the defendant before this accident when it was light; that when he went to work in the morning they sometimes had a little bit of a lamp hanging on the extreme upper end of the stable; practically it didn't furnish any light at all, and occasionally the first driver that came to take his horses and harness them, took the lamp off the wall and placed it inside of the stall and deprived everybody of light in the stable; that sometimes you could come across a man without knowing there was a man at all, it was so absolute darkness; that in the evening it was just equally dark as it was in the morning; that when he went to the stable in the morning the horses were fed; all we had to do was to harness them and take them out; that he found the horses already fed; that he had nothing to do with feeding them; that when he returned in the evening the feed was always ready; that he found the feed in the stalls; that he never paid any attention to the other drivers' stalls.

And thereupon the witness was asked the following questions and gave the following answers:

Q. Now, Mr. Brown, on the day of the accident, what time was it when you reached that stable in the evening? A. It must have been nearly seven o'clock; between six and seven.

Q. When you reached the stable was it light or dark? A. It was dark.

41 Q. Whom, if anyone, did you see in the stable? A. I found Coleman in one of my stalls.

Q. What Coleman? A. The watchman.

Q. Was he in your stall when you got there? A. In my stall scattering straw, putting the finishing touches for the night for the horses.

Q. What did you do when you reached the stable? A. You mean the stall. I unharnessed my horses. After our general duties are performed the driver unharnesses the horses and gives them a little cleaning.

Q. When you were injured, had you finished unharnessing your horses? A. I was finished and on the way of leaving my stalls.

Q. And how long was it from the time that you saw Coleman in your stall to the time that the bale of hay fell on you? A. It didn't take me any longer than a couple of minutes at the time that I was through with my work; just that length of time, it must have been; a few minutes.

Q. Did you ever see any hay thrown down through this opening in the middle of the stable? A. What do you mean?

Q. Did you ever see any hay thrown down through the opening? A. No, sir.

Q. Did you ever see any straw thrown down? A. No, sir; never.

Q. Did you hear any outcry by anybody the evening of the accident, before you were hit? A. No, sir. There was no necessity for anybody to holler. I found the man in the stall and if he had any tendency of doing so he could have told me. I have not

42 heard anybody calling to me.

Q. Were you ever given any instructions about the use of that hole? A. Whatever instructions we have you find them on the application; only as drivers, selling oil. But as far as the condition of the stable we were never told. Our business is working men. We had no instructions about the surroundings inside of the stable.

Q. Were you ever told by anybody that that hole was used to drop hay through? A. No, sir, never.

Q. Were you ever in the stable when it was daylight? A. No, sir, not before I was injured. After I was injured I went there.

Q. Did you then observe it? A. After?

Q. Yes. After the injury when you went back from the hospital.

—. ——.

Q. Did you ever see any hay thrown down, or straw, or anything thrown down through that hole? A. No, sir.

Q. Did you have any idea that the hole was used for that purpose? A. I never noticed that hole.

Q. What was that answer? A. I never noticed that hole. It was so dark that you could hardly see anything.

Q. Never noticed the hole? A. Never noticed it; no conception of any such place as that?

Q. No conception? A. No.

Q. When you were injured, where were you in the stable at the time the accident occurred—when you were struck? A. Right near my stalls—leaving the stalls.

Q. Leaving your stalls? A. Leaving the stalls. I was on
43 the way to retire. The hole is about the space of my two stalls.

Q. What did you do when you were injured? What did you first do? A. I haven't any conception of doing anything at that time. I was entirely knocked out.

Q. According to your first recollection after the accident, where were you located? A. Well, I recall, a part of my memory, being badly shaken up in the ambulance, but was entirely unconscious. I might have exclaimed—might have cried out, being hurt, but I——

Q. Where did you go after the accident, if you know? A. To the hospital.

Q. To what hospital? A. Providence.

And thereupon the plaintiff further testified that the straw struck him on the spine and back of his head, and on the left side of his shoulder; that he suffered extremely at Providence Hospital that night; that he was very sick the next morning and suffered very badly; that he suffered all the time there in the hospital; that he was entirely paralyzed and could not move a bit; that he found himself entirely deaf the next morning; that he was stony deaf the next morning; you had to whisper in my ear; that this deafness gradually grew worse; that his hearing improved a little after regaining his health, but his original sense of hearing never returned; that his hearing was not perfect before the accident, but it never interfered with his way of performing his duties and work; that the

pains, the next morning, affected his spine, right here (in-
44 dicating small of back), also his left side; that he must have been in the hospital about two weeks, and then he declined to stay in the hospital; that he wanted to come home; that he had been home about a month, before returning to work, and then he made an effort to go to work and suffered a relapse and had to be taken home and had to be put in a plaster cast; that he has pains now, at the same places; that he is sick most of the time; that generally by walking a half a dozen squares or so he gets entirely exhausted and helpless; that his head gets so dizzy that "I couldn't account even for the presence of people;" that is my condition at the present time; that he has made several efforts to do work, to haul dirt for the company, since the accident, but had to give up; that he couldn't haul it, because his health wouldn't permit him; that he could not perform any labor whatever; that he has not attempted to perform any other labor, to amount to anything; that he secured

a position as watchman for the Health Department at the Smallpox Hospital, but got sick and had to be taken off that; that he suffered with this pain while he was at the Smallpox Hospital and had to send for a doctor—Dr. Dye; that Dr. Wall attended him after the accident; that Dr. Wall has attended him quite often since the accident and up to the present time; that he has been unable to perform any labor since the accident, but that he has done canvassing and so on; not actual labor; not physical labor; that he had trouble in canvassing; he couldn't walk; after walking half a dozen squares he would get exhausted; his head got so dizzy that he couldn't
45 account for any place that he looked at; that it takes him some minutes to recollect his place; that he had pains in his back, head and spine; that he does not sleep well and is very nervous; and suffers pains at night; that he was never sick before the accident; that he was never attended by a doctor before the accident, except for colds sometimes; that he had not had a physician for years, probably, before the accident; that for the last three years, before the injury, he had been employed by the Independent Oil Company in the very same capacity, as a driver and selling oil; that he had to do hard work; that he was a driver and sold oil while he was with the Independent, without any helpers; that he had no trouble then with his back or head, or inconvenience, and suffered no pains; that he was perfectly well before the accident and was never sick, and always discharged his duties as a healthy man; that he was employed by the Standard Oil Company on the recommendation of the Independent; that he had a helper with him while he was with the Standard Oil Company, named Henry Bell; that the helper didn't have anything to do at the stable; he simply got on the wagon and got oil from the tanks; he left the stable with him, the plaintiff, and was with him all day and returned with him in the evening; that Bell was with him, the Plaintiff, and acted as his helper up to the time of the accident; that he, Bell, went with him when he was with the Standard Oil Company and stayed with him until the accident.

And thereupon the plaintiff was asked the following ques-
46 tions, on Cross-examination, and the following answers thereto were given:

Q. Mr. Brown, look at this paper and see whether that is your signature down there. Is that your signature? (Handing witness a paper.) A. Yes, sir.

Q. Now look at those words up there. After the words "How long have you been in the service of the above employer;" are those words "January 9th, 1904," your handwriting? A. Yes, sir.

Q. Is it not a fact that you went to work for the company January 9, 1904, the date of this paper? A. For this company?

Q. For the Standard Oil Company. A. The Standard Oil Company?

Q. You went to work January 9, 1904? A. No, sir.

Q. What made you write that date in there? A. The application

was handed to me that way, but I didn't turn in to work for these people until February 1st.

Q. You wrote that date in there, did you not? A. I must have been in the office.

Q. You wrote that date in there, did you not? That is your handwriting (indicating date on paper)? That is all you have to tell me, is that your handwriting? A. That is what I want to see, how it came there. There is so much pencil writing and ink writing.

Mr. GARDINER: What is that paper, Mr. Ridout?

Mr. RIDOUT: The application when he went to work for the company.

Mr. GARDINER: I object to that unless he shows that the
47 man went to work at the time the application was given.

The WITNESS: This doesn't state that I have been employed by the company. This only asks me how long I have been in the service of the former employer. That refers to the other company that I worked for. That doesn't state working for the Standard Oil Company. That is very plain; a school-boy could understand that.

Mr. RIDOUT: That will be a question for the court. There is nothing said in this paper about the Independent Company.

The WITNESS: I have reported to this company about the first of February. The Standard Oil——

Mr. RIDOUT: Whose handwriting is that?

Mr. GARDINER: Let him finish.

The WITNESS: The Standard Oil Company pays their drivers every fortnight. At the time that I was injured I hadn't received one salary of the company. I was sick at the hospital and my wife received my first wages for two weeks.

Q. Were you not there as a temporary workman before you became a regular driver? A. I have taken out a tank for a half a day and horses were driven out of the stable to the yard. I went out and taken a sick man's tank. When I had disposed of my quantity of oil Mr. Heffner told me that Mr. Parsells wanted to see me in his private office. I went into his private office and he told me that the sick man has returned and paid me for my day's work and I was honorably discharged. He told me whenever there was anything doing he would call for me.

48 Q. Where was the team when you left it that half day?

A. My team was taken right to the front of the place where you load the tanks. I didn't so much as enter the yard—only the office. My tank was taken away from me immediately. I wasn't considered employed by the company any more.

Q. What time on Sunday did you go in to clean your harness? A. No, sir, no driver cleans his harness on Sunday.

Q. You never did? A. No, sir.

Q. Let us come back. Whose handwriting is that date there, 9th day of January, 1904, down there at the bottom? A. I could tell my signature, but I couldn't tell this here 9th of January.

Q. You don't know whose handwriting that is? A. That looks like my handwriting, but I never commenced at the 9th of January.

Q. When you left the stall that night, the 8th of February, towards which door did you go, the main door or the back door? A. To the door leading to the yard to turn in to the delivery room and make out our accounts and turn in money.

Q. So you were going towards the front entrance? A. I was going towards the office.

Q. Were you going to this entrance? Is that the way you were going, towards the entrance (indicating on plat)? A. I would like you to specify here which you call the entrance, the one to the yards? Which do you call the entrance or the exit?

49 Q. Towards which street were you going, K street or I street? A. I went to "I" street, to the office. I was hurt right while retiring from the stall.

Q. And that is where you started to go? A. I started to go to the office to turn in.

And thereupon the plaintiff, to further maintain and prove the issues on his part joined, produced one HENRY BELL as a witness, who testified that he is acquainted with the plaintiff and that he was employed by the plaintiff at the time of the accident; that at the time of the accident he had been employed by the plaintiff about a week, he guessed; that he was employed as the plaintiff's helper; that he left the stable in the morning with the plaintiff; that he would get to the stable about five o'clock in the morning; that I guess Mr. Brown would leave the stable with his wagon about half past six or seven I reckon, just about light, I guess, but that he couldn't remember the hour—the hour the wagon left; that he got in that evening about six; a little after; half past, he guessed; that it was dark when he got in of an evening; that he didn't think he ever got in before dark while he was with Mr. Brown as helper; that he was with the plaintiff the evening he was hurt; that he, Bell, was near the gate in the yard, the driveway in the yard; that Mr. Brown had been at the stable about twenty minutes, he reckoned, before he was injured; that from the time Mr. Brown got there until he was injured, it was about twenty minutes; on reaching the yard that day Mr. Brown taken his horses around to the

50 stable; that he, Bell, stayed outside until Brown got through tending to his horses; that when he next saw Brown he was laying on the floor hurt; that someone came running and said the boss was hurt; that he thereupon went inside of the stable and found Brown laying about in the center of the stable, and one or two men were standing there; that they took Brown down to the office; that after that he was taken to the hospital; that he, Bell, helped take Brown from the stable to the office; that when Brown was carried to the office he was laying on the flat of his back hollering, and that he was hollering from the time he was struck till they got him to the hospital; that he was with Brown the whole day, from the time he left the stable in the morning to the time he got back in the

evening that day and that Brown did not go back to the stable between the time he left in the morning and the time he returned in the evening; that he thinks the wagons were loaded up outside of the stable, near the stable.

And thereupon, on Cross-examination, the witness testified that while acting as Brown's helper he was paid by Brown; that as helper for Brown his duties were to get out of the wagon and carry the oil into various places about town where oil was delivered; that Brown had no regular time for turning in; he just got through his work and turned in; that Brown never got through as early as three or four o'clock while he was working for him.

And thereupon the plaintiff, to further maintain the issues on his part joined, produced as a witness Dr. JOSEPH S. WALL, who
51 testified that he is a practicing physician in the District of Columbia and that he has been praticing medicine for ten years; that he had had some experience in surgery; that he has been for sometime past associate surgeon at Providence Hospital; that he knows the plaintiff and has known him for seven or eight years; that he was Brown's family physician; that Mrs. Brown and her children became patients of his about seven years ago, soon after he graduated; that he never treated Brown himself prior to February, 1904; that he treated his children occasionally before that time and that Brown, sometimes, would be at home when he would call, and he would observe him; that he first treated Brown professionally the 8th of February, 1904, in the Providence Hospital, for injuries to the spine and general contusions; that he was on duty in the hospital when Mr. Brown was brought in after the accident; that he was brought in in a state of great pain and of shock, and that he remained under his care at the hospital something over two weeks; that during that time he saw him each day and prescribed for him; that Brown was under his direct care; that at that particular time Brown had a contusion and concussion of the back and spine, from which he suffered considerable pain; that he was unable to lie down in bed and had to be supported by pillows; that he had considerable difficulty in breathing and required the use of opiates to control his suffering; that he used opiates practically during his stay there, until the last few days, when he got out of bed; that he had recovered from the pains, apparently; then he left the hospital and went
52 home; that he was finally discharged from the hospital; he left; that he didn't think Brown was discharged, but that he left the hospital of his own volition; that Brown went home and he saw him at his house and treated him at his house because he had known Mrs. Brown and treated the children; that he was called in to treat Brown various times since then down to the present time; that he attended Brown at his house for these conditions; that the early part of Brown's illness he treated him for these conditions which he has enumerated, and later on for conditions of neurasthenia and nervous breakdown which he has possessed in the last two years; that Brown's condition, as he recalls it now, has been mostly due to these spinal symptoms which are called traumatic neurosis or

traumatic neurasthenia, and they evidently were the result of this accident; that has not had to treat Brown excepting since the hurt; that his, Wall's, knowledge of Brown's case dates from the time of his injury down to the present time, and that he has treated Brown at various intervals in that time; that he knows that Brown suffered a great deal from the date of the injury to the present time; that when he was first brought into the hospital Brown was in a great deal of pain and that he was suffering a great deal of shock at that time; that Brown recovered from that shock, of course, before he was sent from the hospital; that since then he, Wall, has been called in and even in the last two months has been compelled to give him medicine containing opiates for the control of these symptoms; that so far as this condition that he is in at present is concerned,
53 this neurasthenia, the probabilities are that it will remain permanently; that he, Brown, has had about three years to get well in, and he has not gotten any better, but, if anything, he has gotten worse; that he is worse; that Brown has been unable to perform any manual labor so far as he, Wall, has been able to ascertain, that he has attended him during the times when Brown has been attempting to do certain things, at one time as a watchman in the Health Office, which he was unable to do; that at another time as a teamster, when he attempted to drive a team, but he had to give that up; that he, Wall, would say Brown was unable to perform manual labor at this time; that so far as his, Wall's, knowledge goes Brown's inability to perform manual labor has been continuous since his injury, and that his opinion would be that it would continue the rest of Brown's natural life; that a person having neurasthenia is apt to have a relapse from time to time; that sometimes persons suffering from this disease get apparently well and relapse again, and that the tendency to relapse is of course greater the more they do relapse; that the outlook is not very favorable that Brown will be able to perform manual labor; that he has never sent Mr. Brown a bill, because of his reduced circumstances; that he could not say positively what his services would be reasonably worth, because he has not ever reduced it to that form; that his services would be worth between fifty and seventy-five dollars up to this time; that they run over a period of three years; that the Browns made a small payment occasionally on account of his services; that Brown
54 had defective hearing prior to the accident; that he was hard of hearing before the accident; that Brown was hard of hearing the morning after the accident; that if you spoke in a loud tone of voice Brown could hear you, the next morning, and you didn't have to speak as loud as he, Wall, has seen him, Brown, spoken to here to-day; that he is unable to say distinctly and positively what effect, if any, the accident had on Brown's hearing, because he never treated Brown's ears; that he is not an ear specialist and has never attempted to treat his hearing, but that Brown's hearing has been much worse in the last two or three years than it was before; that Brown's hearing has progressively got worse.

On Cross-examination the witness further testified that the first time he ever treated Brown was the day of the accident; that Brown

was at the hospital about two weeks, and that he saw him every day during that period; that he is unable to state how many times he has seen Brown since he left the hospital; that he saw Brown three or four days after he left the hospital; that he saw Brown at his house on Q street, where he treated him several times and put him in a plaster cast; that after a while he had to take the plaster cast off because Brown could not breathe very well with it on.

And thereupon the plaintiff rested his case.

And thereupon, counsel for the defendant, upon the foregoing, which was then all the evidence in the case, moved the Court to instruct the jury to return a verdict in favor of the defendant, but the Court overruled said motion.

55 And thereupon counsel for the defendant offered in evidence the plat hereinbefore referred to, which is hereto attached as part hereof, marked "Exhibit 'A' to Bill of Exceptions," and the same was duly admitted by the Court.

And thereupon, in order to maintain and prove the issues on its part joined in the case, the defendant produced as a witness one GEORGE E. PARSELLS, who, being first duly sworn, testified that he is employed by the Standard Oil Company; that he has been in the employ of said Company between seventeen and eighteen years; that he was in the employ of the defendant in February, 1904; that he is acquainted with Abraham Brown, the plaintiff; that he has known the plaintiff three or four years; that the plaintiff was in the employ of the defendant from about January 9, 1904, to about December, 1904; that the paper which was shown to the plaintiff when he was on the stand is a Fidelity Deposit Company blank bond, or was before Brown filled it out; that he, Parsells, gave the paper to the plaintiff to fill out about January 9, 1904; that Brown entered the employ of the defendant regularly on January 9, 1904; that it was either on this day or the day before that he, Parsells, gave the application to Brown to fill out—on either the 8th or 9th of January, 1904; that he, Parsells, supposes Brown filled out the application; that Brown's duties while he was with the defendant were selling and collecting for oil, taking care of his horses, harness and wagons; that he drove what is called a tank wagon for the defendant; that Brown met with an accident while he was with the

56 defendant, on the second day of February, 1904; that he, Parsells, heard of the accident about half past seven or eight o'clock that night; that the accident occurred in the stable in which Brown kept his horses; that he, Parsells, has been in the stable and was in it before the accident; that he thinks he saw Brown in the stable before the accident happened, late in the evening, and in the daytime, both; that he saw Brown in said stable in the daytime, prior to the accident, at least a dozen times; that he, Parsells, is familiar with the opening leading through the ceiling into the loft of the stable; that he saw this opening several hundred times before the accident—almost daily, for years; that this opening could be seen by a person walking along the aisle between the stalls in the stable,

very plainly; that it was Brown's duty to put away his horses and take the harness off them. At this point, at the suggestion of Mr. Gardiner, the plat of the stable, above mentioned, which had been received in evidence, was put up on the wall in the court-room where it could be seen by the jury. The witness thereupon pointed out on said plat the stalls in which Brown kept his horses, and marked them with a pencil; and thereupon the witness further testified that the space between the stalls in the stable was twelve feet wide; that the said opening was four feet square; that there was a space of four feet on each side of the opening, between the stalls; that it was Brown's duty to come to the stable on Sundays, clean off his horses and look after his harness; if he didn't have time to do this on Saturday, he was supposed to do it on Sunday; that he,
57 Parsells, went to the stable once or twice a month, on Sundays; that he cannot remember whether he ever saw Brown in the stable on Sunday or not; that the time at which Brown would turn in his horses and wagon on week days, varied; some days he was in at three o'clock, and other days perhaps it would be six or seven o'clock; that there was no regular time for turning in; that the earliest time he, Parsells, ever saw Brown in the stable was three o'clock.

And thereupon the following questions were asked the witness and he made the following answers thereto:

Q. Who employed Brown? A. I did.

Q. You put him to work? A. Yes, sir.

Q. And do you remember whether you went with him to the stable on that occasion? A. I always do as a rule.

Q. You always do? A. Yes, and show him his horses and harness and wagon and all that.

Q. Did you do it in Brown's case? A. Yes.

Q. Do you remember what time of the day it was? A. No, I do not.

Q. It was daylight? A. Oh, yes; it was daylight.

Q. Just tell us what you told him when you took him to the stable. A. As near as I can remember I simply took him to the stable and showed him his horses, his harness, and told him the stalls they were in, explained to him his duties, and then took him down and showed him his wagons.

Q. Were the horses that he had charge of at that time in the stalls that you pointed out on that plat? A. I think they were, yes.

Q. In the same stalls? A. Yes.

And thereupon the witness, on cross-examination, gave the following testimony:

58 Q. Mr. Parsells, how long have you been manager of this branch of the Company? A. I was manager about three or four years.

Q. Did you make an entry of the date that Brown went into the employ of the Standard Oil Company? A. I did not; it was sent to Baltimore.

Q. You made an entry on the books of the Company? A. Yes, there were entries there made.

Q. Do you know Brown's handwriting? A. No, sir, I would not recognize it; I don't remember it well enough.

Q. Is this in your handwriting? (Showing witness writing in a book.) "First and I streets, southeast, Washington, D. C."? A. Yes, sir.

Q. Is this your handwriting? A. Yes, sir.

Q. "Driver" scratched out; was that scratched out by you? A. I suppose so.

Q. "Selling and collecting for oil sold." That is scratched out by you? A. Yes, sir.

Q. "Driver"; that is scratched out by you? A. Yes, sir.

Q. Mr. Parsells, you say you have seen Mr. Brown at that stable at least a dozen times at three o'clock in the afternoon? A. No, not at three o'clock, but between three o'clock and dark.

Q. What were your duties as manager of that concern? A. In respect to the stable I was supposed to look after it.

Q. Were you there every day? A. I was there every day.

Q. Every evening when the men came in? A. As a rule, every evening.

Q. Do you not know as a matter of fact that Mr. Brown was never in that stable at three o'clock? A. No, sir; I do not.

Q. You are positive he was there? A. Yes, sir; I am positive.

Q. At three o'clock. A. I do not say positively at three o'clock, but I mean in the daylight between three o'clock and dark.

59 Q. What time does it get dark in February? A. I should say about five o'clock or half past five o'clock.

Q. You have seen him there a number of times, have you? A. Yes, sir.

Q. Between three o'clock and sundown, dark? A. Yes, sir.

Q. Had he finished his day's work then? A. Yes, sir.

Q. Had his wagon in? A. Yes, sir.

Q. Did you have anything to call your attention particularly to the fact that you saw him there in the afternoon? A. I think I went there a couple of times to tell him about his horses. He was very slovenly about his horses, about his team.

Q. And you saw him there in the daytime? A. Yes, sir.

Q. Is that the usual time for drivers acting in that capacity to be there? A. There are some of them get in earlier than that.

Q. What route did he have? A. What we call the southeast.

Q. He had Anacostia, Good Hope, Twining City, did he not? A. Yes.

Q. And he made that route and got back, you say, at three o'clock in the afternoon? A. Remember, he did not make that all in one day, he had that to do in the week; he didn't go those places you speak of, Anacostia, and so on, I think, but once a week. He had around by the Eastern Branch, East Capitol Street.

Q. And would get back in the afternoon about the same time on an average? A. No, when he went over there he would be later

than when he had to go simply over on the Navy Yard within a stone's throw of the plant.

And thereupon, on redirect examination, the witness further testified that Brown was regularly employed by the defendant on
60 the 9th of January, 1904; that he was employed by the defendant prior to that time; that on one occasion he hired Brown to go to Marlboro to take a mule, when we were short of men, and three or four other times; that Brown got the mule out of the stable where he was hurt; that those were the only times he was employed temporarily.

Q. Do you know whether or not of your own knowledge he went into this stable at that time and before he was regularly employed on the 9th of January? A. I am under the impression he did, but I am not positive.

Whereupon, the defendant, to further maintain the issues on its part joined, produced as a witness HENRY KENNEDY, who, being sworn, testified that he is employed by the defendant and has been working for it about three years; that he knows Brown and has known him about four years; that he knows of the accident; that Brown was with the defendant when he got hurt; that he went to work for the defendant soon after Christmas, the same winter Brown went to work for it; that he had been working for the defendant about a month when Brown met with the accident; that he did not witness the accident, but came up soon after and found Brown hollering; that he heard Brown hollering in the stable and rushed to the stable door and went in, and looked, and Brown was there hollering; that Brown was down on his knees by an upright post, between two stalls, and his hat was off; that they first took Brown to the door and put him on a bale of hay; that he helped take Brown to the office; that Mr. Malone and Mr. Coleman were at the office when Brown was taken there; that Coleman was
61 upstairs when he reached Brown in the stable; that he, Kennedy, has seen Brown in the stable in the daytime, before he was hurt, but could not say how many times; that he could hardly consider it light when Brown was hurt; there were no lamps lit; it was the edge of sundown; that he is satisfied he has seen Brown in the stable sometime in the daytime, because Brown was on duty every Sunday, and that he, Kennedy, was accustomed to go down there to see whether the horses and harness were cleaned; that he saw Brown there at the stable on Sunday; that Brown did very little on Sunday; sometimes he would get some of the other stable men to clean his harness and horses, but generally he did nothing, you might say, it was his place to see it was done; that he could not say how many times he saw Brown in the stable on Sunday, in the daytime, before the accident.

And thereupon, on cross-examination, the witness further testified that the drivers never employed him to clean their horses, on Sunday, but they did employ other men to clean their horses on Sunday; when they did this the drivers would come to the stable and see that the work was done; that he knows that he saw Brown there at the

stable on Sunday; that he knows that Brown has come to the stable on Sunday; that he does not remember the name of the man that Brown had come to the stable and clean off his horses; that Brown always had a man to clean off his horses on Sunday; somebody had to do it; that he, Kennedy, is positive that Brown was hurt that day before the lamps were lit; that it was light enough to see a
62 man; it was light enough to see across the yard; on the edge of sundown; somewhat near the edge of dark, but it was before dark; that Brown was not carried directly from the stable to the office; that he, Kennedy, and Coleman put him on a bale of hay outside of the door, and Coleman went and telephoned for the wagon; that it was sometime before Coleman telephoned, he was sometime, and we didn't go direct to the office; that it was two or three minutes from the time we took him out of the stable until we carried him to the office.

On re-direct examination the witness testified that he didn't suppose it was a minute after he heard the first outcry before he reached Brown in the stable.

Thereupon the defendant, to further maintain the issues on its part joined, produced as a witness one WILLIAM MALONE, who being duly sworn, testified that he is employed by the defendant; that he has been working for it eight years the 5th of August coming; that he knows the plaintiff and has known him three or four years; that the plaintiff commenced to work for the defendant regularly about in December, 1903; that he heard about the accident; that the plaintiff had been working for the defendant about six or seven weeks at the time he was hurt, if he, Malone, is not mistaken; that he did not witness the accident; that he first saw the plaintiff after the accident on the outside of the stable, in the yard; that Coleman and Kennedy were then present; that he is not positive about seeing Brown in the stable before the accident, in the daytime.

Thereupon the defendant, to further maintain the issues
63 on its part joined, called as a witness ALBERT W. GUILD, who being duly sworn, testified that he was summoned as a witness for the plaintiff; that he knows the plaintiff and has been acquainted with him about five years; that he was employed by the defendant in November, 1903; that he entered the employ of the defendant at that time; that about six weeks after that, or two months, somewhere along there, Brown began to work for the defendant; that he, Guild, had been with the defendant a month or six weeks when the plaintiff came to work for it; that he was tank wagon driver for the defendant, and so was Brown; that he cannot positively say whether or not he saw the plaintiff in the stable before the accident, in the daytime, or not.

And thereupon the defendant rested.

And thereafter Dr. JOSEPH W. WALL, who testified in behalf of the plaintiff, appeared and asked leave of the Court to make a correction in his testimony, which was duly granted.

Thereupon this witness further testified that he first treated the plaintiff at the Providence Hospital on the second of February, 1904; that since giving his testimony herein he had refreshed his memory as to the date of the accident to the plaintiff, by reference to the hospital records, and that the plaintiff was injured on the second day of February, 1904, and not on the eighth day of February, as he stated when he was first on the stand.

And thereupon counsel for the defendant, upon the foregoing, which was all the evidence in the case, moved the Court to
64 instruct the jury to return a verdict in favor of the defendant, upon the ground that there was a fatal variance between the plaintiff's amended declaration and the proof, and upon the further grounds that the accident was not caused by the negligence of the defendant, but that it resulted either from the negligence of the plaintiff's fellow servant, Coleman, or from the contributory negligence of the plaintiff, but the Court overruled said motion; to which ruling of the Court the defendant, by its counsel, then and there duly excepted and said exception was noted at the time upon the minutes of the Court.

And thereupon the plaintiff, by his counsel, prayed the Court to instruct the jury as follows:

The jury is further instructed that if it should find from all the evidence in the case that the plaintiff is entitled to recover as against the defendant, in estimating the damages which it should award to the plaintiff, it should take into consideration the character of the injuries which the plaintiff sustained as the result of the defendant's negligence; also of the mental and bodily suffering which the plaintiff endured as a result of such injuries; or expenses which he incurred in his endeavors to be cured of the injuries as a direct result of the defendant's negligence, and it should also consider whether the plaintiff's injuries are permanent, and award such damages to the plaintiff, as in its judgment would be fair and reasonable compensation to him for such injuries.

(Refused & ex. Wright.)

(Given as modified. Wright.)

65 And thereupon, upon all the evidence in the case, hereinbefore set forth, the defendant, by its counsel, prayed the Court to instruct the jury as follows:

Defendant's Prayer.

I.

The jury are instructed that upon the pleadings and all the evidence in this case the plaintiff is not entitled to recover and the verdict should be for the defendant.

(Refused & ex. Wright)

II.

The jury are instructed that the witness John H. Coleman was a fellow servant of the plaintiff at the time of the happening of the accident complained of, and if the jury believe from the evidence that the accident was caused by the negligence of said Coleman, then the plaintiff cannot recover and the verdict should be in favor of the defendant.

(Refused & ex. Wright)

III.

The jury are instructed that the burden of proof rests upon the plaintiff in this case to show affirmatively by a preponderance of the evidence that the accident whereby he was injured, was the result of the negligence of the defendant, and the happening of the accident, without additional proof that it was caused by the negligence of the defendant, is not sufficient to establish the defendant's liability.

(Given & ex. Wright)

66

IV.

The jury are instructed that negligence which is the basis of this action, consists in the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing of what such a person would not have done.

(Given & ex. Wright)

V.

The jury are instructed that the defendant company was not an insurer of the safety of the plaintiff while he was at work for it; and if the jury believe from the evidence that the injuries received by the plaintiff were due to an accident for which no one was to blame, or that it was the result of the carelessness or negligence of the plaintiff himself, or of John H. Coleman, his fellow servant, then the plaintiff cannot recover in this action and the verdict must be for the defendant.

(Refused & ex. Wright)

VI.

The jury are instructed that the defendant was not an insurer of the absolute, or even the reasonable safety of its stable in which the accident in question is alleged to have happened.

(Refused & ex. Wright)

VII.

The jury are instructed that the plaintiff, by entering the employment of the defendant company, and engaging in the
67 work assigned to him, assumed the ordinary risks, hazards and dangers incident thereto, not only so far as they were actually known to him, but also so far as they would have been known to him by the exercise of ordinary care on his part; and if

the jury believe from the evidence that the plaintiff, prior to the time he was struck by the bale of straw mentioned in the evidence, knew, or by the exercise of ordinary care and prudence would have known of the existence of the hole or opening complained of and the manner in which straw or other material used in the defendant's stable was thrown down from the loft through said hole or opening, into the stable below, then the plaintiff cannot recover, and the verdict should be for the defendant.

(Refused as asked & ex.)

(Given as mod. & ex. Wright)

VIII.

The jury are instructed that the negligence of the defendant company must appear from the evidence in this case by affirmative proof, and if the jury find that the circumstances relied upon by the plaintiff to show negligence are consistent with ordinary care on the part of the defendant, then the charge of negligence will fail for want of proof and the verdict must be in favor of the defendant.

(Given by consent. Wright)

IX.

The jury are instructed that when the plaintiff entered the service of the defendant company, the law presumes that he con-
68 tracted with reference to the risks, hazards and dangers ordinarily incident to the business of his employment as the company, within his knowledge, then acquired, conducted it at the time he entered its service.

(Refused as repetition & ex. Wright)

X.

The jury are instructed that the law presumes that the salary or compensation paid to the plaintiff by the defendant company while he was in the company's employ was in part a consideration for the risks, hazards and dangers ordinarily incident to the services performed by him for the defendant.

(Refused & ex. Wright)

XI.

The jury are instructed that there is no evidence whatever in this case tending to show that John H. Coleman was an incompetent or unfit person to perform the duties imposed upon him by the defendant at the time of the happening of the accident, and the jury must therefore presume that said Coleman was a fit and competent person.

(Refused & ex. Wright)

XII.

The jury are instructed that the amended declaration or typewritten statement of the plaintiff's case is not evidence and has no probative force, and that any verdict which the jury may render should be based solely upon the testimony given from the witness-stand, without reference to the contents of said declaration.

(Given & ex. Wright)

69 XIII.

The jury are instructed that their verdict in this case should be based solely and entirely upon the evidence given in their presence, from the witness stand, without regard to the personality of the parties to the suit. It is the duty of the jury to permit neither sympathy nor prejudice in favor of or against either the plaintiff or the defendant Company, to have any influence or effect upon their verdict.

(Given & ex. Wright)

XIV.

The jury are instructed that they should especially look to the interest which the respective witnesses have in the suit or in its result. Where the witness has a direct personal interest in the result of the suit, the temptation is strong to color, pervert or withhold the facts. The law permits the plaintiff to testify in his own behalf, and the plaintiff in this case has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The personal interest which he has in the result of the suit should be considered by you in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.

(Refused & ex. Wright)

XV.

The Court instructs the jury that the number of credible and disinterested witnesses testifying to a material fact or state of
70 facts in dispute for one side or the other is a proper matter for the jury to consider together with all of the evidence in the case in determining where lies the preponderance of the evidence.

(Given & ex. Wright)

XVI.

If the jury find from all the evidence that prior to the accident, the Plaintiff Brown learned of the existence of the opening in the ceiling and that bales of straw were frequently thrown down through said opening, then the Plaintiff is not entitled to recover and their verdict should be in favor of the Defendant.

(Given & ex. Wright)

XVII.

If the jury believe from all the evidence that before the bale of straw referred to in the evidence was thrown down by Coleman he warned the Plaintiff of his intention to so throw down the bale and that the Plaintiff after hearing and understanding the warning, disregarded it and walked beneath the opening, then the Plaintiff is not entitled to recover and their verdict should be in favor of the defendant.

(Given & ex. Wright)

The Court granted the third, fourth, the seventh, (as modified by striking out the word "could" in the two places above indicated, and

inserting in lieu thereof the word "would") the eighth, twelfth, thirteenth, fifteenth, sixteenth, and seventeenth instructions so
71 requested by counsel for the defendant, but refused to grant the first, second, fifth, sixth, seventh, (without modification) ninth, tenth, eleventh, and fourteenth instructions so requested, to which refusal of the Court to grant each of said instructions specified as refused, and to the giving of said instruction numbered seven, as modified, counsel for the defendant then and there separately and severally excepted and said exceptions were severally noted at the time upon the minutes of the Court.

And thereupon the Court on its own motion charged the jury as follows:

GENTLEMEN OF THE JURY, there was nothing in the structure of the stable in question which rendered it a dangerous place for employees to work, but there was that in the use to which the opening in the ceiling was put which rendered that use one that was likely to be dangerous. Therefore a new employee when he came to work in that stable was entitled to know of the dangerous use to which the stable, through that use of the aperture, was put at such times as bales of hay were cast down. All he was entitled to was that he should know that. So that if the situation was such that Brown, before the time of his injury, came by any means to know of this aperture and the use to which it was put, then the defendant satisfied every obligation that was upon it. Therefore you will consider from the evidence whether or not Brown did know, and consider the fact that it was a stable, and consider the fact that stables usually have such apertures; consider whether or not under all the
72 circumstances Brown, before the time of the injury, knew this hole was there, and that it was used for the purpose of throwing down bales of hay; because if he knew that, and knew of the dangerous use to which that part of the stable was put, the Company could have violated no duty which it owed to him. I have said that Brown was entitled to know. Now if, as a matter of fact, he did not know from actually observing or from hearing it from others, if he did not know of the dangerous use to which this aperture was put at those times, then the Company would have failed in the duty which that circumstance laid upon them, that is to say, the duty of acquainting him with the dangerous use to which the hole was put.

The proposition seems involved, but it is not involved. There are two ways that a man can know a thing that he is entitled to know; one by finding it out himself, and the other by having somebody else tell him. This Company was under the duty of telling Brown, unless Brown had found it out himself before he was hurt.

So if you find that Brown did know the dangerous use to which the hole was put, then there is no aspect of the case which would render the company liable to him, as I will presently point out. If on the other hand you find that at the time he was hurt, and up to that day, Brown did not know the dangerous use to which the hole was put when the straw was cast down, that necessarily involves the fact that the company did not tell him, and you will have to see

whether under all the circumstances the effect was to amount
73 to negligence in not telling him; because I cannot say to you as a matter of law that it was negligence for this company in this particular case not to tell Brown that this hole was used for that; because it may be that the circumstances of this particular case, including the nature of the stable and the like, were such that a reasonable man, exercising ordinary prudence, would have found it out for himself, without being told by the company. And if you find that such situation existed, as that the company was justified in believing that any man would see this for himself and find it out for himself, and justified in believing that there was no necessity for them to tell Brown that, because of a right to believe that he would see it or find out for himself, then the company would not under these circumstances have been negligent in failing to acquaint Brown with that use. But if you find that the situation was such that the company was not justified in believing that Brown would find out for himself immediately that the use was dangerous and that this use was made, then the company in that aspect of the case would have been negligent in failing to tell Brown about it, and, as I have said, if he did not actually know it, would be responsible for the injury that Brown sustained. But that is the only theory of the case in which they would be liable; because they would not be liable if you find that Brown was injured simply through the negligence of Coleman. And the reason for that is this, that when one hires himself to work along with others who are hired, in the nature of things
74 he cannot do that without taking the chance of what is going to happen to him from those others, without assuming the risk that those others will be negligent; and if he is injured through the negligence of a fellow employee, then the law cannot see in that situation anything which involves a failure of duty on the part of the employer, because the employer has not failed, it is the employee who has failed. And in that aspect of it there could be no recovery against the company for the negligence of Coleman as disassociated from any act of negligence of the company itself.

Now let me repeat that shortly, so that you will have it clearly in your minds. If you find that at the time he was injured Brown did not know that this hole was used for casting down hay, and if you find that the situation of the stable, the danger of the openings, the times of the use, and the like, were such as not to justify the company in believing that Brown would know that for himself, then the company was under the duty of telling him. If they did not tell him they would be negligent, and responsible for his injuries. That is the only theory in the case on which the Company would be liable, or on which the company would be liable to Brown.

Now, if you find in favor of Brown on this proposition, if you find that the company was negligent in that way, then you will proceed to determine the amount of Brown's damages that he will be entitled to, what sum will fairly compensate him for the injury received. If you find that the injury he suffered is permanent, that is, that it will prevent him from pursuing his walk through life as

he might otherwise have done, then in that regard he will be
75 entitled to such sum as will compensate him.

There is only one other aspect of the case which it occurs to me would be of importance in your deliberations. It is this, that there is evidence which tends to prove that Coleman called down to Brown to look out.

Now, if you find that Coleman did call down to Brown to look out, and that Brown heard him, then you would have to say whether Brown exercised the care and prudence that a man of reasonable caution would have adopted in not failing to keep out of the way; and if you find he was negligent in getting in the way after Coleman called to him to look out, that would prevent his recovery, independent of all the other questions which have been submitted.

Thereupon the Court read to the jury the special instructions heretofore shown as "granted."

You may take your exceptions gentlemen.

All the foregoing exceptions were duly and separately taken before the jury retired, and were duly noted by the Court on its minutes at the time the same were severally taken and before the jury retired to consider of their verdict, and were severally allowed by the Court, and reference is hereby made to the same as though they were now severally and separately stated; and at the request of counsel for the defendant, this bill of exceptions is signed and sealed, and made a part of the record in this case, now for then.

Witness my hand and seal this 15 day of July, A. D. 1907.

DAN THEW WRIGHT, [SEAL.]
Justice of the Supreme Court, District of Columbia.

(Here follows drawing marked p. 75½.)

76 *Memorandum.*

July 16, 1907.—Time to file record in Court of Appeals extended to September 20, 1907.

Directions to Clerk for Preparation of Transcript of Record.

Filed July 16, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 47936.

ABRAHAM BROWN
vs.
STANDARD OIL COMPANY.

In preparing the Transcript of Record for the Court of Appeals in the above-entitled cause, the Clerk will please include the following:

Amended declaration.
Plea.
Joinder in issue.
Memorandum showing verdict for plaintiff.
Judgment on verdict, appeal therefrom and order fixing supersedeas bond at $8,000.00.
Memorandum showing approval of appeal bond by the Court and filing of same.
Order settling Bill of Exceptions, etc.
77 Memorandum showing extension of time to file Transcript of Record in Court of Appeals.
Bill of Exceptions.

A. LEFTWICH SINCLAIR,
Attorney for Defendant.

Motion to Extend Time to File Transcript of Record.

Filed September 13, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 47936.

ABRAHAM BROWN, Plaintiff,
vs.
STANDARD OIL COMPANY, Defendant.

And now comes the defendant, by its Attorneys, and moves the Court to further extend the time for the filing of the Transcript of Record herein in the Court of Appeals of the District of Columbia.

A. LEFTWICH SINCLAIR,
JOHN RIDOUT,
Attorneys for Defendant.

To Messrs. W. Gwynn Gardiner and Creed M. Fulton, Attorneys for Plaintiff:

Please take notice that we shall call up the foregoing
78 motion before Mr. Justice Gould of the Supreme Court of the District of Columbia on Friday, September 13, 1907, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

A. LEFTWICH SINCLAIR,
JOHN RIDOUT,
Attorneys for Defendant.

DISTRICT OF COLUMBIA, *sct:*

A. L. Sinclair on oath deposes and says that on the 9th day of September, 1907, at one o'clock P. M., he duly mailed, postpaid, a copy of the foregoing motion and notice to W. Gwynn Gardiner, Esq., at his last known office address, Fendall Building, No. 344 D street N. W., Washington, D. C.

A. L. SINCLAIR.

Subscribed and sworn to before me this 9th day of September, 1907.

[SEAL.] JAMES F. SMITH,
Notary Public, D. C.

Memorandum.

September 13, 1907.—Time for filing Transcript of Record extended to and including October 15, 1907.

79 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 78 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47936 At Law, wherein Abraham Brown is Plaintiff, and Standard Oil Company, a Corporation is Defendant, as the same remains upon the files and of record in this Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 7th day of October, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1836. Standard Oil Company, a corporation, appellant, *vs.* Abraham Brown. Court of Appeals District of Columbia. Filed Oct. 11, 1907. Henry W. Hodges, clerk.

FRIDAY, *April 10th, A. D.* 1908.

No. 1836.

STANDARD OIL COMPANY, a Corporation, Appellant,
vs.
ABRAHAM BROWN.

The argument in the above entitled cause was commenced by Mr. A. L. Sinclair, attorney for the appellant, and was continued by Messrs. W. Gwynn Gardiner and C. M. Fulton, attorneys for the appellee.

TUESDAY, *April 14th, A. D.* 1908.

No. 1836.

STANDARD OIL COMPANY, a Corporation, Appellant,
vs.
ABRAHAM BROWN.

The argument in the above entitled cause was continued by Mr. C. M. Fulton, attorney for the appellee, and was concluded by Mr. J. J. Darlington, attorney for the appellant.

No. 1836.

STANDARD OIL COMPANY, a Corporation, Appellant,
vs.
ABRAHAM BROWN.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This is a suit brought in the Supreme Court of the District of Columbia by the appellee, plaintiff below, to recover from appellant company damages for injuries sustained while in the employ of said company.

It appears that the plaintiff entered the employ of the defendant in January, 1904, as an oil tank wagon driver. His duties required him to take a team and wagon from defendant's barn in the morning, and, after using it during the day in the delivery of oil, return it to the barn in the evening. The plaintiff was required to groom his team in addition to his duties of delivering oil. The barn in which the horses were kept was thirty feet wide and fifty feet long. It contained two rows of stalls, one on either side, with a space of twelve feet between, extending the full length of the barn. In the ceiling, above the space between the stalls and about the middle of the barn, there was an opening four feet square surrounded on the floor of the loft above by a wooden enclosure or box about four feet

high. In the loft was stored baled straw, which was used for bedding the horses.

It further appears that for about nine years, one Coleman had been employed by the defendant, and among his duties was that of bedding the horses; that, during the period of his employment, Coleman had been accustomed to throw bales of straw through the opening in the ceiling from the loft to the floor below. In doing so, it was necessary to lift the bale up to the top of the box or enclosure in the loft and push it over, so that it would fall through the opening. Plaintiff received the injuries complained of on February 2, 1904, by being struck by a bale of straw dropped by Coleman from the loft through said opening.

Plaintiff, in his declaration, alleges, among other things, as follows: "That on or about the 8th day of February, A. D. 1904, while the defendant was carrying on the said business (dealing in oils) as aforesaid in the manner aforesaid, the plaintiff was then and there in the employment of the said defendant as a laborer, and plaintiff was then and there required and directed by the said defendant, in the performance of his duty as a laborer as aforesaid, to enter said stable of the said defendant in the said city of Washington, District of Columbia, in which said stable there was a loft or storeroom where the feed for the horses was kept, and a certain hole or opening through which said feed passed from said loft or storeroom to the stable below; and it then and there became and was the duty of the said defendant to have the said hole or opening so guarded that the hay and feed from the loft or storeroom would not fall upon the said plaintiff while he was in the exercise of his said duty as a laborer in the stable below, yet the defendant, wholly neglecting its said duty in that regard, then and there, and while the plaintiff was engaged as aforesaid in said stable in the performance of his duty as a laborer as aforesaid, and in pursuance of the instructions and directions of the defendant as aforesaid, did not protect the said hole or opening in any way whatsoever, but wholly disregarding its said duty in the premises, carelessly and negligently allowed a bale of the said hay to fall through the said hole or opening upon the said plaintiff, who was at work in the stable below, and who was wholly ignorant of the said defendant's careless and negligent manner of protection, being otherwise in the exercise of due care and diligence on his part, in consequence whereof said plaintiff was struck by the said bale of hay on the side of his head and neck and shoulder, and on the lower portion of his back, and, by reason of the said bale of hay striking the said plaintiff as aforesaid, he then and there suffered a severe shock to his whole system."

The declaration is in four counts. The aforegoing allegation as to the negligence of the defendant is substantially the same in the second and third counts of the declaration. The fourth count, however, in addition charges negligence against defendant as follows: "It then and there became and was the duty of the said defendant to not only have the said hole or opening so guarded that the hay and feed in said loft or storeroom could not pass through said hole or opening and fall upon and injure those engaged in the performance

of their respective other duties in the stable below, but that it became and was also the duty of the said defendant to not permit the said hay and feed to be thus passed through the said hole or opening without proper warning or timely notice to those employed in the stable below, and it also became and was the duty of the said defendant to exercise such care and diligence in the matter of employing reasonably skilful, competent, and careful employees to so handle the said hay and feed in transmitting the same from the loft or store-room above to the stable below as not to endanger the lives and limbs of those employed in the stable below; and it then and there became and was the duty of the said defendant to give its employees engaged in handling or placing the hay and feed as aforesaid, as well as those who were employed in the stable below, such proper and necessary instructions with respect to the dangers of passing the hay and feed through the said hole or opening and the performance of their respective duties, as to prevent injury and danger to the lives and limbs of the employees engaged in the stable below; yet the defendant, wholly neglecting its said duties in this regard then and there and while the plaintiff was engaged as aforesaid, and in pursuance of the instructions and directions of the defendant as aforesaid, did not protect the said hole or opening in any way whatsoever, or do any of the other duties that it was called upon to discharge in the premises, but wholly disregarding its said duties in the premises, did so carelessly and negligently allow a bale of the said hay to fall, or to be passed or thrown through the said hole or opening, without any notice or warning or signal or instruction of any kind to plaintiff or by any of its said employees."

The court, at the request of counsel for defendant, instructed the jury, in substance, that it was incumbent upon the plaintiff to show affirmatively by a preponderance of the evidence that the accident was the result of the negligence of the defendant; that such negligence must consist in the failure to do what a reasonable and prudent person would ordinarily have done under the same circumstances; that, when plaintiff entered the employment of defendant company and engaged in the work assigned him, he assumed the ordinary risks, hazards, and dangers incident thereto, not only in so far as they were actually known to him, but also in so far as would have been known to him by the exercise of ordinary care on his part; that, if plaintiff, prior to the time of the accident, by the exercise of ordinary care and prudence would have known of the existence of the hole or opening complained of, and the manner in which straw or other material was thrown through said hole, plaintiff can not recover; that, if the circumstances relied upon by plaintiff to show negligence are consistent with ordinary care on the part of the defendant, plaintiff can not recover; that, if prior to the accident, the plaintiff learned of the existence of the opening in the ceiling, and that bales of straw were frequently thrown through said opening, then plaintiff can not recover; that, if just prior to throwing the bale of straw through the opening, which injured plaintiff, the coemployee Coleman, who threw the bale of straw, warned plaintiff of his

intention, and plaintiff, after hearing and understanding the warning, disregarded it, and walked beneath the opening, then plaintiff can not recover.

The court on its own motion, among other things, instructed the jury that plaintiff was entitled to know the purpose for which the opening in the ceiling was used. "There are two ways that a man can know a thing that he is entitled to know; one by finding it out himself, and the other by having somebody else tell him. This company was under the duty of telling Brown, unless Brown found it out himself before he was hurt. So if you find that Brown did know of the dangerous use to which the hole was put, then there is no aspect of the case which would render the company liable to him.

The court further instructed the jury, in effect, that if, at the time plaintiff was injured, he did not know that danger existed in the barn, it is for the jury to determine from the evidence whether or not it was negligence for the company not to have informed him of the existence of the opening in the ceiling and the use made of it. If the jury find that the situation at the barn was such that defendant was justified in believing that any man would see the conditions there existing himself, the defendant was not required to acquaint plaintiff with the conditions there existing, but, if you find that the situation was such that the company was not justified in believing that Brown would find out for himself immediately that the use was dangerous, and that this use was made of the hole, then the company would be held to be negligent in failing to inform the plaintiff of it, and would be liable for the injuries sustained.

The jury were further instructed to the effect that no liability would attach to the defendant by reason of the injuries sustained by plaintiff if he was injured exclusively through the negligence of Coleman. The law will not hold defendant liable for an injury so caused alone by the negligence of a fellow-employee. The court summed up its charge as follows: "If you find that at the time he was injured Brown did not know that this hole was used for casting down hay, and if you find that the situation of the stable, the danger of the openings, the times of the use, and the like, were such as not to justify the company in believing that Brown would know that for himself, then the company was under the duty of telling him. If they did not tell him they would be negligent, and responsible for his injuries. That is the only theory in the case on which the company would be liable."

There was evidence adduced at the trial to show that plaintiff had never been advised by the defendant, or any of defendant's employees, either of the existence of the opening in the ceiling, or the purpose for which it was used. Plaintiff testified to this effect, and further, that during the period of his employment—less than two weeks—he was required to leave the barn with his wagon to deliver oil at 6 o'clock in the morning, and that he did not complete the delivery of the oil and return to the barn until 6 or 7 o'clock in the evening. At the time of year that he was employed—in January—he left the barn before daylight in the morning and returned after

dark in the evening. It also appears that the barn was poorly lighted, there being but a small oil lamp at each end of the passageway between the stalls.

The witness Coleman testified that he not only notified plaintiff of the use made of the opening in the ceiling, but warned him before throwing down the bail of straw that injured him. He testified in part as follows:

"Q. Now state whether or not, prior to that time, you told Brown about that hole, and what it was used for? A. Yes, sir; I stated to Mr. Brown——

"Q. When? A. When he first came there, like I would any other new man. Every new man that came along I told him about the hole and what it was used for.

"Q. Yes. A. Not because there was any imminent danger there. There was nothing dangerous about that hole at all, because it was used to throw down straw, and I hollered always before I would throw anything down. I had a knack of hollering if I would throw anything down, and I would holler even if I threw down only a little dust to look out below. I had no way to get dust out of that place. I would carry the dust to the north door to sweep it out.

"Q. Tell us as near as you can what you said to Brown about this hole at the time he started to work for the Standard Oil Company? A. At the time he started to work?

"Q. Yes. A. Oh, I pointed him to the hole.

"Q. You pointed out the hole to him? A. Yes, sir; I pointed out the hole, and told him what it was used for.

"Q. What did you tell him that it was used for? A. To throw down straw, sometimes, and any time that I hollered, to look out below; and I think any man that ever worked there will tell you the same, that I have told him what that hole was for.

"Q. The hole was used regularly for the purpose of throwing down straw for bedding for the horses, was it not? A. Yes, sir; that is what they used it for.

"Q. And how long had you used it for that purpose? A. I used it all the time I was there."

Plaintiff, in his testimony, denies that Coleman either called his attention to the hole, or explained its use, or gave him any warning on the evening of the accident. Coleman is not corroborated by any of the employees, as to his custom of calling out to persons below before throwing straw through the opening.

It is contended by counsel for defendant that the court erred in refusing to instruct the jury to return a verdict for defendant. It is insisted that this instruction should have been given for the reason that there is a fatal variance between the averments of plaintiff's declaration and the proof. There are four counts in the declaration. In the first three the defendant is charged with negligence in not keeping the hole or opening in the ceiling of the barn so guarded that hay and feed kept in the loft would not fall through upon plaintiff while he was engaged in the proper performance of his duties. In other words, these three counts charged defendant with

having failed to properly protect the hole or opening, and having allowed a bale of hay, by reason of such improper protection, to fall through said hole or opening upon the plaintiff. There is clearly a fatal variance here, for the evidence discloses that the hole or opening in the ceiling was protected or guarded in the loft by a box extending around it to a height of four feet. The evidence is uncontradicted to the effect that it was impossible for anything from the loft to go through the opening until it was lifted over this box and thrown down. Plaintiff's whole case rests upon evidence to the effect that one Coleman, a fellow-employee with plaintiff, threw the bale of straw through the opening that caused plaintiff's injury. Hence, it will be observed, that what is complained of in the first three counts of the declaration, the improper guarding of the opening to prevent feed and hay from falling through, was not, according to the evidence, the cause of the accident.

We think, however, that this defect is cured on the fourth count of the declaration. Here, it is charged that the negligence of the defendants consisted in permitting hay and feed to be passed through the hole or opening without notice to those employed in the stable below; that defendant failed to give its employees proper instructions with respect to the danger of the situation, and allowed a bale of hay to be "thrown through the said hole or opening, without any notice, or warning, or signal, or instruction of any kind to plaintiff." While the allegations of this count are not as clear and explicit as the rules of good pleading demand, we think they are sufficient to charge defendant with negligently permitting the accident to occur through the agency of one of its servants. We do not deem it essential for plaintiff, in his declaration, to name the agency that caused the accident, if is alleged that defendant was directly responsible for the infliction of the injury. The allegation that defendant caused the bale of straw to be thrown through the hole or opening is sufficient. So far as liability is concerned, if the accident resulted from the negligence of defendant, it is immaterial if the bale was thrown by an employee of defendant, so long as it is alleged that it was caused to be thrown by the defendant.

It is further insisted that the jury should have been instructed by the court to return a verdict for defendant because the accident in question was not caused by the negligence of the defendant but resulted either from the contributory negligence of the plaintiff, or from the negligence of plaintiff's fellow-servant, Coleman. We are of the opinion that the jury was fully justified in finding from the evidence that the use made of the opening, in throwing bales of straw through it to the floor below, was a dangerous use. It was a condition existing in the barn, and one which, if permitted to continue with the knowledge of the defendant, would, in the absence of contributory negligence on the part of plaintiff, render defendant liable for the injury sustained by plaintiff.

Numerous authorities have been cited by counsel for defendant to the effect that there is no duty imposed upon an employer to anticipate breaches of duty on the part of his employees; that the law presumes that servants will obey the law and faithfully perform their

duties; that, while the defendant was bound to use ordinary care and provide a reasonably safe place for plaintiff to work, it was not required to guard the place against negligent and unauthorized use by one of its servants; that when one enters the employment of another he takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of his employment; that an employer is not required to instruct an employee in regard to dangers which can only result from the negligence of a fellow-servant, and that the servant must make a reasonable use of his senses, and if a condition is apparent which of necessity must be dangerous, he is required to exercise reasonable and ordinary care in relation thereto. These principles are all so elementary that it would serve no good purpose to discuss them, further than to suggest that we do not think they apply to the facts in this case.

Plaintiff was not injured as the result of a single breach of duty on the part of his fellow-servant Coleman. For nine years, Coleman had been in the employ of defendant, and for most of the time had been engaged in the work he was doing at the time plaintiff was injured. The throwing down of the particular bale of straw that injured plaintiff was not the sole negligent and unauthorized act of Coleman; it was what, to the knowledge of defendant, he had been doing for years. The continuous and repeated acts of Coleman were what rendered the place dangerous. While defendant would not be chargeable with negligence if the injury of plaintiff had resulted from Coleman, without the knowledge or permission of defendant, throwing a single bale of straw through the opening, defendant will be presumed to have known of the continued and accustomed use which was made of the opening and to have authorized it to be so used. The distinction consists in defendant's knowledge of the dangerous use. It will not be contended that defendant would be liable if it had instructed Coleman to only throw loose straw through the opening, and, that being the customary manner of conveying straw from the loft to the floor below, Coleman, on this particular occasion, had violated instructions, departed from the custom, and thrown down the bale of straw. That would present a different case from the one before us, yet that is the case presented by most, if not all, of the authorities cited by counsel for defendant.

Defendant, if guilty of permitting a dangerous condition to exist in its barn, can not relieve itself from responsibility by hiding behind the negligence of Coleman. The negligence of a fellow-servant will not relieve the defendant from liability where there is evidence from which the jury could find that the defendant was guilty of negligence and that its negligence contributed to the injury. In Railroad Co. *v.* Cummings, 106 U. S., 705, it is said: "If the negligence of the company contributed to—that is to say, had a share in producing the injury—the company is liable, even though the negligence of a fellow-servant was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong." In Rogers *v.* Layden, 127

Ind., 50, the court said: "The law can not be reproached with such injustice as is involved in the assertion that a wrongdoing employer may shelter himself behind the act of his employee, who, like himself, has been guilty of an actionable wrong." The defect in defendant's position consists in attempting to attribute a single act of negligence to Coleman; in other words, insisting that Coleman, by a single negligent act of which defendant could not be expected to have knowledge or take notice, converted the barn from a safe to a dangerous place. But that is not this case. Here Coleman was doing what he had been accustomed to do, as he testified, with the knowledge and approval of defendant's local superintendent. The danger consisted in the customary, and not the exceptional, use made of the opening in the ceiling.

Under the state of facts here presented, we are of the opinion that it was the duty of defendant to notify its employees of the unusual and dangerous use made of the opening in the ceiling. While plaintiff testified that he had never seen the hole, we think if he had, and had been informed, as the evidence of Coleman implies, that bedding for the horses was thrown down through it, he would have been justified in assuming, in the absence of specific instructions or knowledge to the contrary, that the material would be thrown down in such a manner as to insure the safety of persons below. There is no evidence to the effect that plaintiff was informed of the careless and dangerous manner in which the straw was thrown through the opening. Neither is there any evidence that plaintiff was ever in the barn, prior to the time of the injury, when straw was so thrown down, so that he could have observed the reckless manner in which Coleman performed his work. We are forced to the conclusion that defendant must not only be presumed to have known, but that it did know, of the manner in which its servant Coleman was accustomed to use the opening. This being established, in the absence of contributory negligence on the part of plaintiff, liability attaches.

The case of railway Co. *v.* Dixon, 194 U. S., 338, is especially relied upon by counsel for defendant as being decisive of this case. We find no difficulty in distinguishing it. There Dixon was injured while on duty in the operation of the trains of the railroad company. He was injured as the result of a mistake of an operator and the train dispatcher, and it was held that the company was not liable. The distinction between this case and the one at bar is clearly stated by Mr. Justice Brewer as follows: "Here the company had adopted reasonable rules for the operation of all its trains. No imputation is made of a want of competency in either the train dispatcher or the telegraph operator. So far as appears they were competent and proper persons for the work in which they were employed. A momentary act of negligence is charged against the telegraph operator. No reasonable amount of care and supervision which the master had taken beforehand would have guarded against such unexpected and temporary act of negligence. Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He can not be personally present everywhere and at all

times, and in the nature of things can not guard against every temporary act of negligence by one of his employees." In that case the court exonerates the company for reasons that do not appear in this case. There a momentary act of negligence on the part of an employee occurred of which the company could not have had notice. Here it was not a momentary act on the part of Coleman. He was doing what he had done for years. There is no evidence to the effect that he was not a competent person to perform the duties assigned him. It must, therefore, be presumed that his custom of throwing baled straw through the opening in the ceiling of the barn was a custom established with the knowledge and consent of defendant. If Dixon in the case just cited had been injured as the result of a dispatch sent with the approval of the railroad company, or in accordance with an established negligent custom in the operation of the road, there would have been no question of the liability of the company. And that is the case at bar. We can not view it from any other standpoint.

It is well settled, that even though the master is negligent in not giving his servant instructions as to the dangerous conditions attached to his employment, if the servant, through others, or through his own observation, receives such information, and is afterwards injured, the master is not liable. In that case, the servant would be chargeable with contributory negligence in voluntarily and knowingly placing himself in a dangerous position where accident was liable to occur. In the case at bar, the question of the contributory negligence of the plaintiff was fairly presented to the jury. The evidence discloses that the use of the opening in the ceiling of the barn was a regular one, and, therefore, became one of the dangerous conditions attached to the employment of those assigned to perform work in the barn. The whole question presented to the jury was, whether plaintiff had been informed of this danger, or had been so situated that he had an opportunity to observe the danger. If he had, and exposed himself to the danger, he was guilty of contributory negligence. If not, defendant was guilty in not informing him of the existence of this dangerous condition. This question was fairly presented to the jury, under the instructions of the trial court, and the jury found in favor of plaintiff. We think the evidence is sufficient to support the verdict.

Defendant complains of the following instruction: "The jury are instructed that the plaintiff, by entering the employment of the defendant company, and engaging in the work assigned to him, assumed the ordinary risks, hazards, and dangers incident thereto, not only so far as they were actually known to him, but also so far as they would have been known to him by the exercise of ordinary care on his part; and if the jury believe from the evidence that the plaintiff, prior to the time he was struck by the bale of straw mentioned in the evidence, knew, or by the exercise of ordinary care and prudence would have known, of the existence of the hole or opening complained of, and the manner in which the straw or other material used in the defendant's stable was thrown down from the loft through said hole or opening into the stable below, then the plaintiff can not

recover, and the verdict should be for the defendant." While we think this instruction fairly states the law as to assumed risks, if there was any error at all, it was one in favor of defendant and against the plaintiff. The rule on this point is clearly stated in Railroad Co. *v.* McDade, 191 U. S., 64, as follows: "The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question, the true test is not in the exercise of care to discover the dangers, but whether the defect is known or plainly observable by the employee."

From a careful review of the record in this case, we are of the opinion that the evidence is sufficient to support the verdict, and that the charge of the court was most favorable to the defendant. We find no prejudicial error. The judgment is affirmed with costs, and it is so ordered.

Affirmed.

TUESDAY, *May 5th, A. D.* 1908.

No. 1836, April Term, 1908.

STANDARD OIL COMPANY, a Corporation, Appellant,
vs.
ABRAHAM BROWN.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE VAN ORSDEL.
May 5, 1908.

FRIDAY, *May 8th, A. D.* 1908.

No. 1836.

STANDARD OIL COMPANY, a Corporation, Appellant,
vs.
ABRAHAM BROWN.

On motion of Mr. A. Leftwich Sinclair, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of ten thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Standard Oil Company, a Corporation, Appellant, and Abraham Brown, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error. what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of May, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, the Standard Oil Company, a body corporate, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Abraham Brown in the full and just sum of Ten Thousand ($10,000.00) Dollars, to be paid to the said Abraham Brown, or to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of May, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between said Standard Oil Company and the said Abraham Brown, a judgment was rendered against the said Standard Oil Company; and the said Standard Oil Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Abraham Brown

citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Standard Oil Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

STANDARD OIL COMPANY, [SEAL.]
By JNO. D. ARCHBOLD,
Vice-President. [SEAL.]

Attest:
CHARLES S. WHITE,
Ass't Secretary.

FIDELITY & DEPOSIT COMPANY
OF MARYLAND, [SEAL.]
By CHAS. R. MILLER,
Vice-Pres't. [SEAL.]

Attest: PHILIP L. SMALL,
Ass't Sec'y. [SEAL.]

Sealed and delivered in the presence of—

——— ———.
——— ———.
——— ———.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1836. Standard Oil Company, a Corporation, Appellant, *vs.* Abraham Brown. Supersedeas Bond on Writ of Error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed May 22, 1908. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Abraham Brown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Standard Oil Company, a Corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 22nd day of May, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted May 22d, 1908.
CREED M. FULTON,
Counsel for Def'd't in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 22, 1908. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

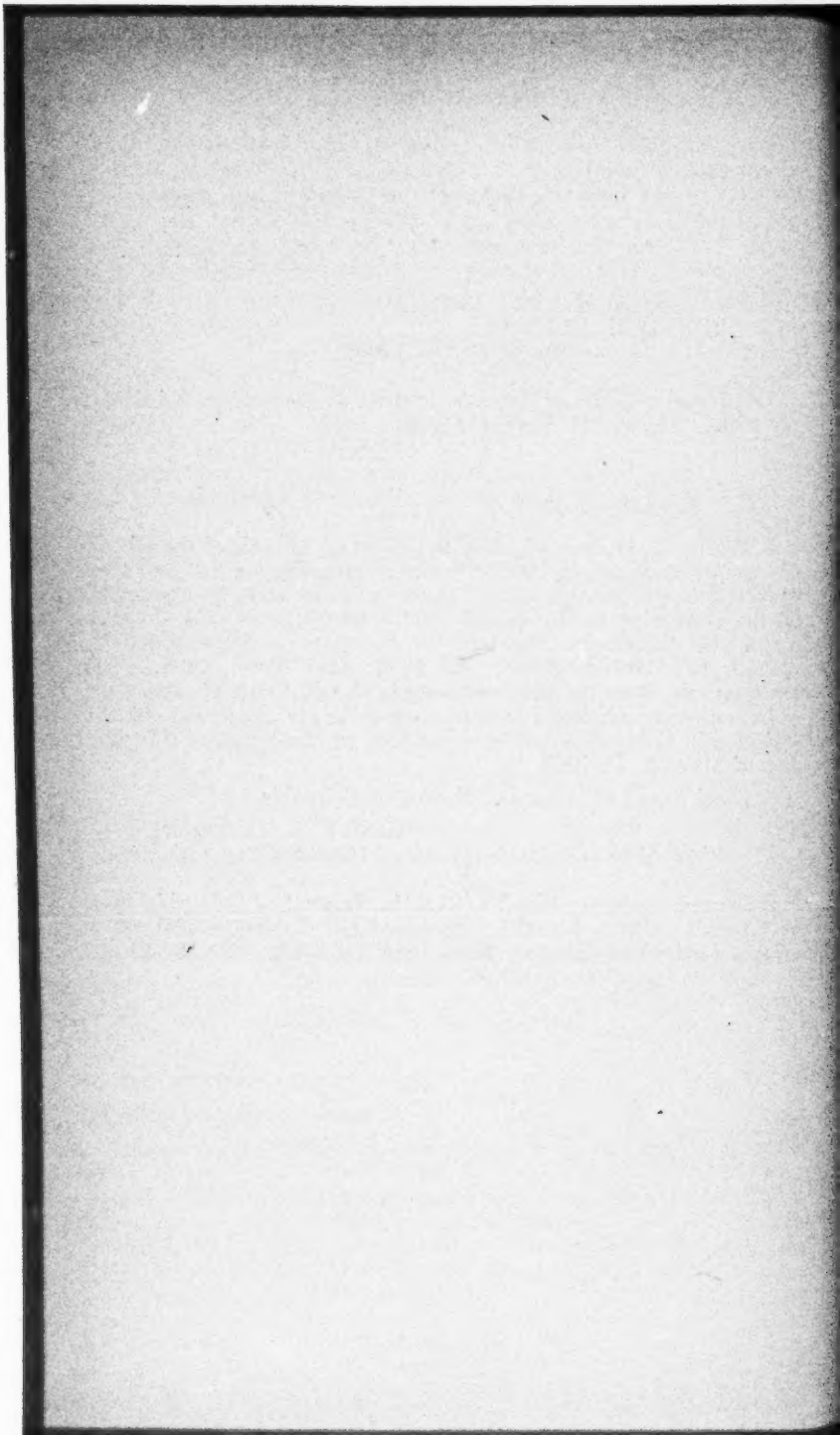
I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 55 inclusive, contain a true copy of the transcript of the record and proceedings of said Court of Appeals in the case of Standard Oil Company, a Corporation, Appellant, *vs.* Abraham Brown, No. 1836, April Term, 1908, as the same remain upon the files and records of said Court of Appeals.

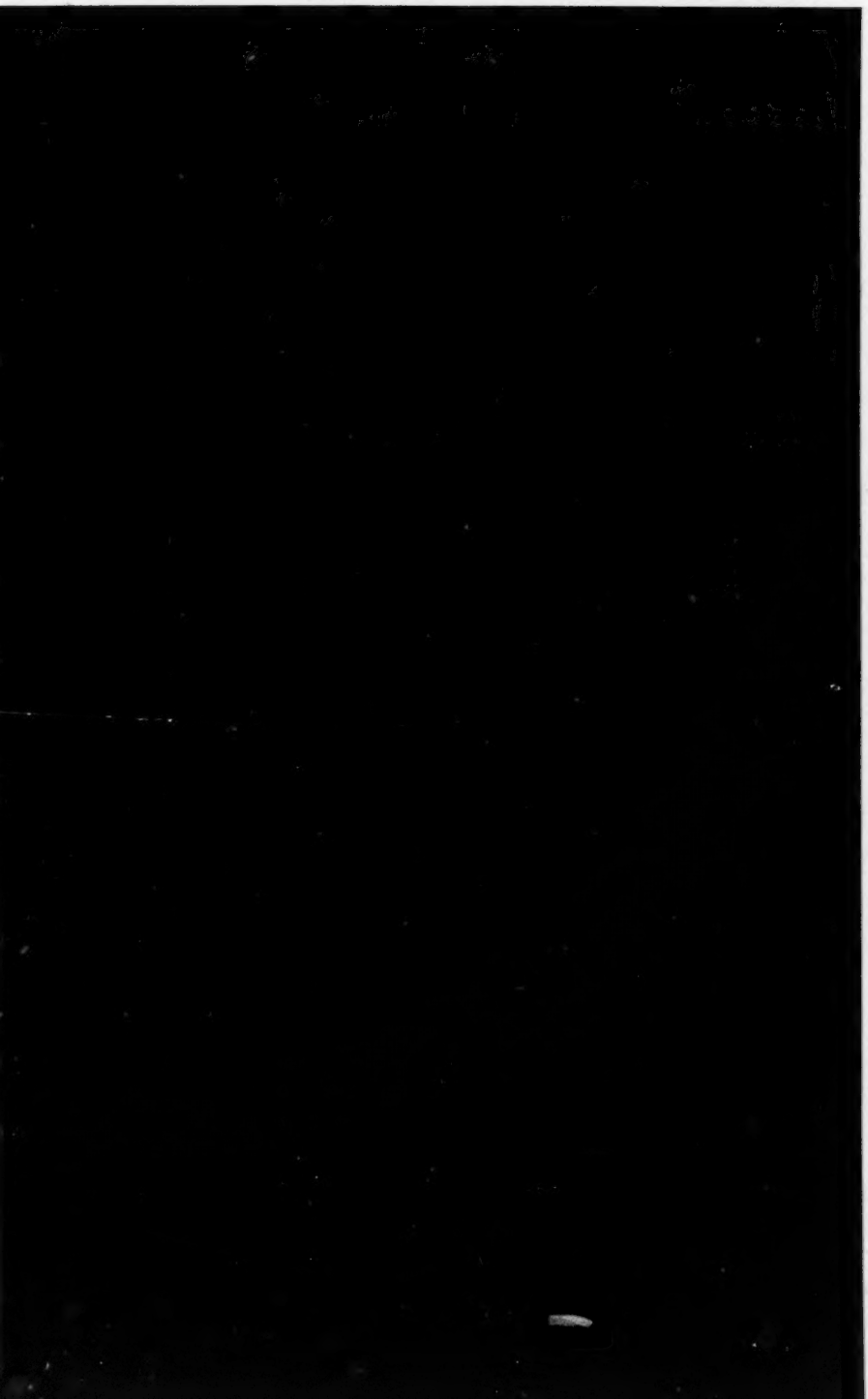
In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 22nd day of May, A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,204. District of Columbia Court of Appeals. Term No. 421. Standard Oil Company, plaintiff in error, *vs.* Abraham Brown. Filed June 1st, 1908. File No. 21,204.





IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 168.

STANDARD OIL COMPANY, PLAINTIFF IN ERROR

vs.

ABRAHAM BROWN, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

Statement of Case.

This action was instituted by the defendant in error, Abraham Brown, as plaintiff, in the Supreme Court of the District of Columbia, to recover damages for personal injuries sustained by him by being struck by a bale of straw in the stable of his employer, the plaintiff in error (Rec., pp. 1–6).

The case was tried before the Supreme Court of the District of Columbia upon an amended declaration and a plea of not guilty. The trial resulted in a judgment in favor of the plaintiff for $6,500 (Rec., p. 7). An appeal was taken by the defendant to the Court of Appeals of the District of Columbia (Rec., p. 41), where the judgment below was affirmed (Rec., pp. 43–52).

It appears from the bill of exceptions that the plaintiff entered the regular employment of the defendant on

or about January 9, 1904, as a tank wagon driver. His duties required him to take a team from the defendant's stable in the morning, and after using it during the day in the delivery of oil, to return it to the stable in the afternoon. The plaintiff was also required to groom the horses of his team, which work was done during the daytime.

The stable in which the team was kept was thirty feet wide, 150 feet deep, and could accommodate about eighteen horses. It contained two rows of stalls, one on each side of the stable, and there was a space of twelve feet between the stalls. The stalls in which the plaintiff kept his horses were about in the middle, on the west side of the stable. In the ceiling of the stable was an opening four feet square, surrounded on the floor above, in the loft, by a wooden enclosure or box about four feet high. In this loft were stored hay and bales of straw used for feeding and to provide bedding for the horses kept in the stable below.

Because of said surrounding enclosure or box the bales of straw could not pass through said hole or opening to the floor below, unless lifted at least four feet above the floor of the loft and pushed through the opening.

The hole or opening was used for the purpose of transferring the straw stored in the loft to the floor below as needed.

For about nine years one John H. Coleman had been employed by the defendant, and among his duties was that of procuring from said loft and spreading in the stalls of the stable the necessary straw for bedding for the horses from time to time, as required, and during the period of his employment Coleman had been accustomed to transfer the straw used for this purpose through said opening in the ceiling.

The injuries of which the plaintiff complains were received by him on February 2, 1904, by being struck by an unopened bale of straw dropped down from said loft by Coleman through said opening.

The Evidence.

The evidence, in brief, was as follows:

Charles H. Hunt, a witness for the plaintiff, testified (Rec., pp. 8–11) that he was employed in the office of the defendant at the time of the happening of the accident, and that he was acquainted with both the plaintiff and Coleman; that at the time of the accident Brown had been regularly employed by the defendant about two weeks; that the plaintiff was a tank wagon driver for the defendant, and delivered oil and collected for his deliveries; that the plaintiff also had to put his horses in the stable and clean them off; that Coleman was night watchman around the plant, and it was his duty to feed the horses kept in the stable and provide bedding for them; that he did not know when the drivers would leave the stable in the mornings; that they got in at different hours; that he judged Brown generally arrived at the stable some time about 5 o'clock; that he (witness) had been in the stable perhaps a dozen times and had been in the loft several times; that *said hole or opening was protected by a board fence around the hole, a plank fence, which extended three feet and a half or four feet above the floor of the loft;* that the hole *could be seen by him when he was walking in the aisle between the stalls;* that he first learned of the accident in the neighborhood of 6 o'clock on the day the accident occurred, through Coleman, when he came to the office and stated that he had dropped a bale of hay or straw on Brown and wanted to telephone for an ambulance; "that Coleman stated the circumstances under which he

dropped the straw on Brown about the time the ambulance was telephoned for; that Coleman stated that he dropped the bale of straw down through this hole in the stable and hit Brown with it; that *he called to Brown before he threw the straw down through the hole;* that a short time after Brown was hurt he was sent to Providence Hospital and remained there about a month, probably; that Brown came back to work for the defendant about a month and a half after the accident."

John H. Coleman, the next witness called by the plaintiff, testified (Rec., pp. 11–18) that he was in the employ of the defendant and had been employed by it about nine years; that at the time of the accident Brown's duties were stable duties; that he (witness) was night watchman, and it was his duty to feed the horses twice a day, night and morning, and had been doing this work for nearly nine years; that Brown had been working for the defendant possibly about two months or more before the accident; that he got acquainted with him when he first came there; that the drivers had to leave the stable about 6 o'clock in the morning, and they would return usually after they got through with their route; that they had no regular time to return; that Brown would get in sometimes after dark, and sometimes before dark; that on the day of the accident Brown was in the stable when he (Coleman) got there; that he did not know how long Brown had been there; that he (Coleman) was not there when Brown arrived; *that said hole in the ceiling of the stable was used for putting down straw for bedding for the horses; that he had used the hole for this purpose during the entire time he had been feeding; that the hole was well protected with a wainscoting partition around it; that nothing could fall down through the hole unless it was absolutely turned up and thrown down; that it was only what you threw down that went down;* that there was

an air shaft, with light, window lights, over the hole to let in air.

On cross-examination Coleman testified that *Brown reached the stable the day of the accident before he did; that he saw him in the stable when he (Coleman) arrived, and spoke to him, and then proceeded up the steps into the stable loft; that when he (Coleman), reached the stable that day it was not dark; that he was positive it was not dark;* that on reaching the loft on the day of the accident the first thing he did was to throw down the hay for the horses through the chutes leading to the racks; *that he then got a bale of straw from the north end of the bin, adjoining the opening, and called out to Brown to "look out below;" that Brown replied "all right," and he (Coleman) then proceeded to raise the bale of straw up on the wainscoting, and just as he was about to let it go, just as he lost his reach on it, Brown appeared right under the hole;* that he (witness) hollered out excitedly, but Brown seemed to *draw himself right up*, and, of course, he (witness) saw the bale when it struck him, and hurried down stairs; that it was *his (witness') custom to holler before he dropped anything through the hole always; to give warning to everybody around; that he had to lift the bale of straw about three feet and a half in order to throw it down; that the protection or fence around the hole was about three feet and a half high; that the protection was a square box above the floor; that he hollered out to Brown to "look out below," before he threw the straw down, and that Brown answered "all right;" that he is positive Brown answered "all right," and he didn't have any fear of hurting him after Brown answered him; that he (witness) told Brown when he first came to work for the defendant about the hole and what it was used for, not because there was any danger there, but because it was used to throw down straw; that he hollered always before throwing anything*

down; that he had a knack of hollering if he would throw anything down, and he would holler even if he threw down only a little dust, to "look out below; that he had used the hole for the purpose of throwing down straw for bedding for the horses all the time he (witness) was there, during which time hundreds of men had worked there and never got hurt; that there was an aisle between the stalls of the stable about twelve feet wide; that said hole or opening was about four and a-half feet square and was in the middle of the aisle and about the middle of the stable; that the hole was about three feet from the stalls in which Brown kept his horses; *that a person could pass from stall to stall without being under the hole; that it was not dark when he saw Brown in the stable on the date of the accident; that he had frequently seen Brown in the stable in the daytime, prior to the accident; that Brown was in view of the hole at the time he called his attention to the hole and told him what it was used for; that Brown was at the stable before he was regularly employed, on extra work; that he did some work and then went off, sometime before he got regular work there; that before Brown was regularly employed by the defendant he came to the stable regularly mornings and didn't have anything to do and he would go back again; that this was in the daytime; that it was daytime when he warned Brown about the hole and explained to him what it was used for; that anybody entering the stable in the daytime could see the hole;* that usually he didn't throw down any straw when it was dark; that he was always pretty well through before it got dark; *that it was impossible for a bale of straw to get down through the said hole without somebody lifting it up.*

On redirect examination the witness testified that among the other drivers whom he had warned about the throwing of straw down through said hole were Mr.

Malone, Mr. Heffner, Mr. Guiles, Mr. Duffy, Mr. Barbour, Mr. Taylor, and Mr. Schoenthal; that he warned these men and all the other men who were employed by the defendant about the hole, before they went to work for the company; that Brown was sometimes hard of hearing.

Joseph Heffner (Rec., pp. 18–20) testified that he was employed by the defendant in February, 1904, as a tank wagon driver, and that he was acquainted with Brown; that Brown was employed by the defendant while he (Heffner) was there; that he was employed by the defendant altogether about four years and was with the company about two years before Brown was hurt; that his duties were the same as Brown's; that the drivers had no regular times for turning in; that Brown turned in between half past five and six o'clock; *that said hole or opening in the ceiling of the stable was used for throwing straw down through for bedding for the horses.* On being asked to state whether or not any instructions were given him when he went to work for the defendant as to the use of the hole in question, the witness replied, "Well, I had no instructions at all, *only that the feed was thrown down there—to look out below.*" The witness further testified that while there were *only two lamps in said stable in the month of February, about 6 o'clock in the morning, one could distinguish a person in the middle of the stable; that he could see how to harness his horses; that there were two lights in the stable always, one at each end; that said whole was used for throwing straw through.*

On cross-examination the witness testified that *straw was thrown down through said opening by Coleman, and that Coleman always hollered "Look out" when he, (Heffner) was there; that he has been up in the stable loft and knew about the box that was around the hole and projected above the floor of the loft; that said box was about three and a half feet high.*

William Heffner (Rec., pp. 20–21) testified that he was employed by the defendant about the time of the accident; that the drivers were supposed to leave the stable about 6 o'clock in the morning; that he did not know at what time Brown turned in in the evenings; that he saw Brown the day of the accident, after the accident, in the office; that the accident occurred about 6 o'clock; *that said hole was supposed to be used for throwing down the feed;* that there were no rules or anything else given him about the use of the hole to his knowledge.

The plaintiff himself (Rec., pp. 21–26) testified that he had worked for the defendant about a week before he was hurt; that the accident occurred *about the 8th of February, 1904;* that he was a driver for the defendant and seller of oil; that he had to report at 5 o'clock in the morning, get his horses out, hook them up, and at 6 o'clock he had to be at the yard; that he returned to the stable in the evening at no regular time; that he generally got through with his work at 6 or 7 o'clock; that he had a very extensive route; that he never returned to the stable in the evening before dark; that he was never in the stable before the accident when it was light; that there was one lamp in the stable, but practically it didn't furnish any light at all; that it was dark when he reached the stable the evening of the accident; that it was between 6 and 7 o'clock; that he found Coleman there when he arrived in one of his (Brown's) stalls; that when he was injured he had finished harnessing his horses, and was on the way of leaving the stalls; that he was struck by the bale about two minutes after he saw Coleman in one of the stalls; that he never saw any straw thrown down through said opening; that he heard no outcry by anybody the evening of the accident; that "there was no necessity for anybody to holler. I found the man in the stall, and if he had any tendency

of doing so, he could have told me. I have not heard anybody calling to me." On being asked the question as to whether he had ever been given any instructions about the use of said hole, the witness replied: "Whatever instructions we have, you find them on the application—only as drivers, selling oil; but as far as the condition of the stable, we were never told. Our business is working men. We had no instructions about the surroundings inside of the stable." The witness further testified that he was never told by anybody that said hole was used to drop hay through; that he never saw any hay, or straw, or anything else, thrown down through said hole.

> "Q. Did you have any idea that the hole was used for that purpose? A. I never noticed that hole.
>
> Q. What was that answer? A. I never noticed that hole. It was so dark that you could hardly see anything.
>
> Q. Never noticed the hole? A. Never noticed it; no conception of any such place as that.
>
> Q. No conception? A. No.

The witness further testified that when he was struck he was leaving the stalls; that he was on his way to retire; that the hole was about the space of his two stalls; that he had no conception of doing anything when he was injured; that he was entirely knocked out; that he was entirely unconscious; that after the accident he was taken to Providence Hospital; that the straw struck him on the spine and back of the head and on the left side of his shoulder; that he suffered extremely at the hospital that night; that the next morning he found himself entirely deaf; that his original sense of hearing has never returned; that his hearing was not perfect before the accident; that he must have been at the hospital

about two weeks; *that he declined to stay at the hospital and went home; that he had been home about a month before returning to work;* that he still suffers from the injuries received and is not able to work as formerly; *that for the last three years, before the injury, he had been employed by the Independent Oil Company in the very same capacity, as a driver and selling oil; that he had to do hard work; that he was a driver and sold oil while he was with the Independent, without any helpers; that he was employed by the defendant on the recommendation of the Independent Oil Company; that he had a helper with him while he was with the defendant up to the time of the accident—before the accident.*

On cross-examination the plaintiff identified his signature to an application for a bond made out at the time he was employed by the defendant, and stated the words "*January 9th, 1904,*" appearing therein after the words "How long have you been in the service of the above employer?" *were in his handwriting;* that he was with the defendant *as a temporary workman before he became a regular driver; that when he was struck he was retiring from the stall; that he was going toward "I" street, to the office, to turn in.*

Henry Bell (Rec., pp. 26–27) testified that at the time of the accident he was in the employ of Brown, as a *helper,* and had been so employed about a week before the accident; that Brown would leave the stable with his wagon about half past six or seven; that he got in in the evening at about six; that he didn't think Brown ever got in before dark while he was with him as helper; that Brown had been in the stable *about twenty minutes the evening of the accident before he was hurt.*

On cross-examination the witness testified *that while acting as Brown's helper he was paid by Brown;* that as helper his duties were to get out of the wagon and carry the oil into various places about town where oil

was delivered; that Brown had no regular time for turning in.

Dr. Joseph S. Wall (Rec., pp. 27–29) testified that he had known the plaintiff for several years, but had never treated him professionally before the accident; that he was the plaintiff's family physician; that he was on duty at Providence Hospital when Brown was brought there after the accident and treated him for injuries to the spine and general contusions; that when Brown reached the hospital he was in a state of great pain and shock; that Brown remained under his care at the hospital for about two weeks; *that Brown was never finally discharged from the hospital; he left the hospital of his own volition;* that he treated Brown subsequently at his home and later on for conditions of neurasthenia and nervous breakdown which he has possessed in the last two years; that Brown's condition, as he then recalled it, was mostly due to traumatic neurosis or traumatic neurasthenia, and they were evidently the result of the accident; that the probabilities are that this condition will remain permanently; that Brown has been unable to perform any manual labor, as far as he (Wall) has been able to ascertain; *that Brown's hearing was defective before the accident; that he was unable to say what effect, if any, the accident had on Brown's hearing.*

George E. Parsells (Rec., pp. 29–32), the defendant's first witness, testified that he was employed by the defendant on the date of the accident and had been in its employ between seventeen and eighteen years prior thereto; that Brown was in the employ of the defendant from *about January 9th, 1904, to about December, 1904;* that the paper which was shown to the plaintiff when he was on the stand is a Fidelity Deposit Company blank bond, or was before Brown filled it out; that *he (Parsells) gave the paper to the plaintiff to fill out about January 9, 1904; that Brown entered the employ of the defend-*

ant regularly on January 9, 1904; that it was either on this day or the day before that he (Parsells) gave the application to Brown to fill out—on either the 8th or 9th of January, 1904; that he supposes Brown filled out the application; that Brown's duties while he was with the defendant were selling and collecting for oil, taking care of his horses, harness, and wagons; that he drove what is called a tank wagon for the defendant; that the accident in question occurred on the *second day of February, 1904,* in the stable where Brown kept his horses; that he (Parsells) had been in the stable before the accident and thinks that *he saw Brown in the stable before the accident, late in the evening and in the daytime, both; that he saw Brown in the stable prior to the accident, in the daytime, at least a dozen times;* that he (Parsells) is familiar with the opening leading through the ceiling into the loft of the stable; that he saw this opening several hundred times before the accident—almost daily, for years; that the *opening could be seen by a person walking along the aisle between the stalls in the stable, very plainly;* that it was Brown's duty to put away his horses and take the harness off them. At this point the witness pointed out on the plat attached to the Bill of Exceptions, which had been received in evidence, the stalls in the stable in which Brown kept his horses, and marked them with a pencil; and thereupon the witness further testified that the space between the stalls in the stable was *twelve feet wide; that said opening was four feet square; that there was a space of four feet on each side of the opening, between the stalls; that it was Brown's duty to come to the stable on Sundays, clean off his horses, and look after his harness;* if he didn't have time to do this on Saturday, he was supposed to do it on Sunday; that the time at which Brown would turn in his horses and wagon on week days *varied; some days*

he was in at 3 o'clock, and other days perhaps it would be 6 or 7 o'clock; that there was no regular time for turning in; that the *earliest time* he ever saw Brown in the stable was *3 o'clock;* that he employed Brown and put him to work for the defendant; that when he employs men to drive for the defendant he always goes with them to the stable and shows them their horses and harness and wagon, and that *he did this with Brown in the daytime; that he took Brown to the stable and showed him his horses, his harness, and told him the stalls they were in, explained to him his duties, and then took him down and showed him his wagons.*

On cross-examination the witness testified that he had been manager of the defendant about three or four years; that he did not make an entry of the date Brown went to work for the defendant; that there *were entries made, but they were sent to Baltimore; that he went to the stable several times, in the daytime, to tell Brown about his horses;* that he was very slovenly about his horses, about his team; that he saw Brown in the stable *a number of times between 3 o'clock and sundown;* that he had finished his work then and had his wagon in; that Brown had what is called the southeast route; that he had Anacostia, Good Hope, and Twining City, *but that Brown did not make that route all in one day; that he had to cover the route in one week; that he didn't go to the places mentioned but once a week;* that when he went around by the Eastern Branch and East Capitol street, he would be later than *when he simply had to go over on the Navy Yard, within a stone's throw of the plant.*

On redirect examination the witness testified that *Brown was regularly employed by the defendant on the 9th of January, 1904, but that he had done work for the defendant before that time.*

Henry Kennedy (Rec., pp. 32–33) testified that he was

employed by the defendant at the time of the accident; that he had been working for the defendant about a month when Brown met with the accident; that he did not witness the accident, but came up soon after and found Brown hollering in the stable; that Brown was down on his knees by an upright post, between two stalls; that they first took him to the door and put him on a bale of hay; that Coleman was upstairs when he reached Brown; *that he (Kennedy) has seen Brown in the stable in the daytime, before he was hurt,* but could not say how many times; that he *could hardly consider it light when Brown was hurt; that there were no lamps lit;* it was the edge of sundown; *that he is satisfied he has seen Brown in the stable some time in the daytime; that he saw him in the stable on Sunday, in the daytime, before the accident, but he could not say how many times.*

On cross-examination the witness testified that at the time Brown was hurt it was *light enough to see a man; it was light enough to see across the yard;* that it was before dark.

William Malone (Rec., p. 33) testified that he had been employed by the defendant several years; that Brown commenced to work for the defendant about in December, 1903; that he heard about the accident; that Brown had been working for the defendant about *six or seven weeks at the time he was hurt;* that he saw Brown in the yard soon after he was hurt; that he is *not positive about seeing Brown in the stable, in the daytime, before the accident.*

Albert W. Guild (Rec., p. 33) testified that he entered the employ of the defendant in November, 1903, and that about six weeks after that, or two months, somewhere along there, Brown began to work for the defendant; that he (Guild) had been with the defendant a month or six weeks when the plaintiff came to work for it; that

he could not *positively* say whether or not he saw Brown in the stable, in the daytime, before the accident.

Dr. Wall (Rec., p. 34) at this point appeared and *asked leave of the court to make a correction in his testimony, and his request being granted,* the witness further testified that *since giving his other testimony he had refreshed his memory as to the date of the accident to the plaintiff, by reference to the hospital records, and that the plaintiff was injured on the second day of February, 1904, and not on the eighth of February, as he had stated when he was first on the stand.*

The foregoing is substantially all of the evidence adduced at the trial, as will be seen by an examination of the bill of exceptions.

Assignment of Errors.

The Court of Appeals erred in sustaining and affirming the action of the trial court—

1. In refusing to grant the defendant's motion to instruct the jury to render a verdict in favor of the defendant (Rec., p. 34).

2. In refusing to grant the defendant's instruction numbered 1 (Rec., p. 34).

3. In refusing to grant the defendant's instruction numbered 5 (Rec., p. 35).

4. In refusing to grant the defendant's instruction numbered 6 (Rec., p. 35).

5. In refusing to grant the defendant's instruction numbered 7, without modification, and in giving said instruction, as modified (Rec., pp. 35–36).

6. In refusing to grant the defendant's instruction numbered 9 (Rec., p. 36).

7. In refusing to grant the defendant's instruction numbered 10 (Rec., p. 36).

8. In refusing to grant the defendant's instruction numbered 11 (Rec., p. 36).

9. In refusing to grant the defendant's instruction numbered 14 (Rec., p. 37).

Points and Authorities.

I.

The first assignment of error grows out of the refusal of the trial court to instruct the jury to return a verdict in favor of the defendant, at the close of all of the evidence in the case.

The grounds upon which the court was asked to direct a verdict for the defendant were, that there was a fatal variance between the plaintiff's amended declaration, and the proof, and that the accident in question was not caused by the negligence of the defendant, but resulted either from the negligence of the plaintiff's fellow-servant, Coleman, or from the contributory negligence of the plaintiff.

We submit in the first place, that there was clearly such a variance between the allegations of the plaintiff's amended declaration and the proof as to disentitle him to go to the jury.

It is well settled that to entitle a plaintiff to go to the jury, the evidence offered in support of his pleadings must conform closely to the allegations thereof.

> 13 Encyclopædia Pldg. & Pr., 910, and cases cited.
> Hetzel *vs.* Railroad Co., 7 App. D. C., 524.
> Arrick *vs.* Fry, 8 App. D. C., 125.

As was said by the court in Hetzel *vs.* Railroad Co., supra:

> "It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover, and the one must consist with the other."

It will be observed that the plaintiff's amended declaration in this case (Rec., pp. 1–6) contains four counts, and that in all but the last count the allegation is that it was the duty of the defendant to have the hole or opening complained of *so guarded* that the hay and feed kept in said loft would not fall upon the plaintiff while he was in the exercise of his duties in the stable below, and the *complaint* is that the defendant *did not protect* the said hole or opening, but carelessly and negligently *allowed* a bale of said hay to fall through said hole or opening, upon the plaintiff.

In the fourth or last count of the declaration it is alleged that it was the duty of the defendant *to guard* said hole or opening, and that it was its duty to *so guard* it that no hay or feed could fall through said hole or opening without some warning or notice, and not to permit the said hay and feed to be thus passed through the said hole or opening without proper warning or timely notice to those employed in the stable below; and that it was the duty of the defendant to employ reasonably skillful, competent, and careful employees to so handle the said hay and feed in transmitting the same from the loft to the stable below, and not to endanger the life and limb of those employed in the stable below; and the *sole complaint* in this count is that the defendant—

> "*did not protect* the said hole or opening in any way whatever, but wholly disregarding its said duty in the premises, carelessly and negligently *allowed* a bale of the said hay to fall through the said hole or opening upon the said plaintiff who was at work in the stable below, and who was wholly ignorant of the said defendant's carelessness and negligence, being otherwise in the exercise of due care and diligence, on his part, in consequence whereof said plaintiff was struck by the said bale of hay on the side of his head and neck and shoulders," etc.

It will be seen that, while the duty of the defendant with respect to said opening may be properly set forth in the fourth count, this duty is not charged by said count to have been violated at all, save in the respect that the defendant "did not protect the said hole or opening in any way whatever," and carelessly and negligently "allowed a bale of the said hay to fall through the said hole or opening upon the said plaintiff."

It thus very clearly appears that the sole failure of duty specifically alleged and relied upon by the plaintiff in his declaration is the negligent failure of the defendant to *protect the opening, and its allowing a bale of hay to fall through the opening* upon the plaintiff.

When we come to examine the evidence adduced at the trial, we find no support whatever for this allegation of the declaration. The uncontradicted, undisputed testimony is that the opening complained of was protected and in nowise dangerous or unsafe in itself, and that the accident was caused, not by the defendant's permissively allowing a bale of hay to fall through the opening, but by a bale of straw being lifted up from the floor of the loft by a fellow-servant of the plaintiff, onto the enclosure or box surrounding the opening, and thrown or dropped down through the opening, upon the plaintiff.

Under the authorities such a showing in support of the averments of the declaration was wholly insufficient, it is submitted, to justify the trial court in submitting the case to the jury.

Where a plaintiff has charged particular negligence, proof of other and different acts or omissions as a ground of liability will constitute a fatal variance.

Shanke *vs.* U. S. Heater Co., 125 Mich., 346.
Brown *vs.* Miller, 62 S. W. Rep., 547.
R. Co. *vs.* Shockman, 52 Pacific Rep., 446.
Waldhier *vs.* R. Co., 71 Mo., 514.
Pennington *vs.* Detroit etc., R. Co., 90 Mich., 505.

Batterson *vs.* Railroad Co., 49 Mich., 184.
Alford *vs.* Dannenberg, 177 Ill., 331.
Railroad Co. *vs.* Foss, 88 Ill., 551.
Railroad Co. *vs.* Mock, 72 Ill., 141.
Railroad Co. *vs.* Collins, 118 Ill. App., 270.
Long *vs.* Doxey, 50 Ind., 385.
Curren *vs.* Railroad Co., 86 Mo., 62.
Ischer *vs.* Bridge Co., 95 Mo., 261.
Sayward *vs.* Carlson, 1 Wash., 29.
Brown *vs.* L. & L. Co., 65 Mo. App., 162.
Thomas *vs.* Railroad Co., 35 S. W. Rep., 910.
Pryor *vs.* Railroad Co., 90 Ala., 32.
Railroad Co. *vs.* Guyton, 36 So. Rep., 84.
The Elton, 142 Fed. Rep., 367.
Labatt, M. & S., sec. 859, note 1 (a).

There is a fatal variance where the evidence, instead of proving the tort alleged, proves or tends to prove another tort.

22 Encyclopædia Pldg. & Pr., 568, and cases cited.

Where there is no evidence sustaining counts in a declaration as to the defendant's negligence, he is entitled to an instruction that no recovery can be had under the counts.

Mining Co. *vs.* Fulton, 205 U. S., 60.

It was conceded below by the defendant in error that there was a variance, as claimed, between the allegations of the first, second and third counts of the declaration, and the proof at the trial, and that the assignment of error based upon the variance must be overcome, if at all, by the fourth count. For such a purpose, under well-recognized principles, we must look, not as in the brief of the defendant in error, to the *whereases* or inducing preamble of the count, but to its specific allegations or charges of negligence; which are that the defendant "did not protect the said hole or opening in any way

whatever," or do any of the other duties that it was called upon to discharge in the premises, but, wholly disregarding its said duty in the premises—

> "did so carelessly and negligently allow a bale of the said hay to fall, or to be passed, through the said hole or opening, without any notice or warning or signal or instruction of any kind to the plaintiff or by any of its said employees, so as to fall with great force upon plaintiff."

The charge, therefore, preferred against the defendant, and which, alone, it was in court to meet, was that of a hole or opening not protected in any manner, through which it allowed a bale of hay to fall without notice, warning, signal or instruction to the plaintiff.

The case, and the only case, attempted to be made at the trial, was that of a perfectly protected opening, such as "stables usually have" (Rec., p. 38), and the only negligence, if any, upon which recovery was sought was the failure to call it to the plaintiff's attention, and plaintiff's claim that he heard no warning or signal given. That, with such a variance between the pleadings and the evidence, there could be no recovery, without amendment, we submit is clear upon the authorities, nor are any cited in the brief for the appellee to the contrary.

Among the examples of fatal variances, as established by the authorities, the following are illustrative cases:

An allegation of the absence of a key in the bolt which fastened the tender to the engine, and proof that the bolt, though not absent, was so short that it could not be "keyed" and made secure (Railway Company *vs.* Thompkins, 83 Ga., 759); an allegation that a train, moving backward, was not stopped, as it should have been, in obedience to a signal given by a train hand, because of defects in the engine preventing its being seen

by the engineer on account of escaping steam, and proof that the train was moving forward, that the signal was given by the plaintiff's intestate and that the failure to stop was due to the fact that the engineer did not see the signal, because of the escaping steam (Pennington *vs.* Railway Company, 90 Mich., 505); an allegation that the accident was caused by the use of uneven, unsound, rotten, unsafe and defective boards, and proof, not that the boards were unsound, but that they were at a point where the ground was too soft for their proper or available use (Shanke *vs.* Heater Company, 125 Mich., 346); an allegation that the plaintiff fell into an unlighted and unguarded excavation, and proof that the work of excavation had been completed and a flight of stairs constructed, left unlighted and unguarded, down which the plaintiff fell (Kane *vs.* Joliet, 103 Ill. App., 195); an allegation that the employer knowingly furnished an unsafe and defective wheel, and proof that the accident happened because of failure to warn the plaintiff while the wheel was being tested to determine whether it was safe (Seltzer *vs.* Arms Co., 74 Conn., 46); an allegation that the plaintiff was hurled, thrown, and forced from a fire-truck, and proof that, in order to escape the negligently threatened injury, the plaintiff jumped from the truck and was injured (Higgins *vs.* Wilmington, 3 Penn. (Del.), 356); an allegation that a sidewalk was out of repair by reason of some of the planks being broken, and proof, not that any were broken, but that two of the planks had been removed (Bloomington *vs.* Goodrich, 88 Ill., 558); an allegation that the injury sued for, from a boiler explosion, was because of defects in the boiler, and proof that the result was from negligence and unskilfulness in operating it (Long *vs.* Doxey, 50 Ind., 385); an allegation that the defendant was in the occupation of premises adjoining a highway, in which there was an unguarded pit which it

was its duty to guard, and proof that the defendant, though in possession of the highway, was not in possession of the adjoining premises in which the unguarded pit was situated, though under duty to guard it by reason of its possession of the public street (Ayers *vs.* Chicago, 111 Ill., 406); an allegation of injury to a brakeman irom negligence in using different systems of bumpers for the coupling of cars, and proof of negligence in that the bumpers were loose and out of repair (Fox *vs.* Railway, 107 Ia., 660); an allegation of negligence in taking fire, from an engine operated on premises adjoining plaintiff's, placing it on straw and stubble, and permitting the fire to spread and burn over plaintiff's premises, with proof that the fire was properly turned from the engine and put on the ground, but that defendants were negligent in not properly extinguishing it thereafter (Leuallan *vs.* Musgrove, 33 Ore., 282); etc., etc.

In no one of the decisions cited, we submit, was there a stronger case for the doctrine in question. Under the plaintiff's fourth count, the only one which his counsel contends for as escaping the objection, the negligence charged is the maintenance of a hole or opening unguarded or unprotected in any way, as to the danger of which unguarded hole or opening it was the defendant's duty to give its employees necessary instructions, and that it carelessly allowed a bale of hay to fall, be passed or thrown through such unguarded hole without notice, warning, signal or instruction. The proof was evidence tending to show a properly and perfectly protected opening, such as is usually found in stables, and a claim of negligence limited to the alleged omission of the defendant to instruct the plaintiff where it was, followed by an alleged failure of his fellow-employee to give warning of the descending bale. It will be seen that the authorities are overwhelming against recovery, without amendment,

where such a variance exists between the pleadings and the evidence.

Nor can the defect be obviated, as is attempted in the opposing brief, by arguing that the stable was poorly lighted, that the drivers left before daylight and did not return until after dark, or that the drivers sometimes took the lamps from their proper places into the stalls, and thus left the stable dark, etc. *No such conditions, nor any negligence in respect to them, is charged in the declaration;* and they are, accordingly, as far from being admissible grounds for submitting the cause to the jury under the pleadings as the very defects which they are appealed to to cure.

In The Elton, 142 Fed. Rep., 367, it was said, in part:

> "The reason and philosophy of all rules of pleading, in admiralty as well as elsewhere, require that the ground of liability in an action for negligence should be so stated as to inform the party pursued of the real nature and gravamen of his alleged offense. If he be liable on either of two grounds, as distinct and differentiated as those we have discussed in the present case, the statement of one of them alone will not suffice as a statement of the one omitted. In the case before us, the respondents are informed by the libel, that the libelant relies for his recovery upon their alleged negligence and carelessness, in allowing the winch to be managed by an incompetent and inexperienced person—as we have said, a clear, definite and well-understood ground of liability. Upon an issue framed on this allegation, the respondents are required only to meet the proof in support thereof. They are not required, and can not reasonably be expected, to meet the proofs as to another ground of liability not stated, to wit, an isolated act of negligence of the servant employed, even if such other ground of legal liability exist. In the libel, the respondents are charged with dereliction of a personal duty—a willfully

committed offense, and no other ground of liability is suggested. There is nothing so peculiar in admiralty pleading, as would allow another and different ground, in which there is no element of personal dereliction or offense, to be urged in substitution for the only ground alleged in the libel. We think, therefore, that the learned judge of the court below erred in holding that the question of the winchman's negligence, upon the single occasion in question, in either of the aspects discussed, was an issue fairly raised by the pleadings.'

Referring to the question of variance in the case at bar, the Court of Appeals says (Rec., p. 48):

> "While the allegations of this count are not as clear and explicit as the rules of good pleading *demand*, we think they are sufficient to charge defendant with negligently permitting the accident to occur *through the agency of one of its servants*. We do not deem it essential for plaintiff, in his declaration, to *name the agency that caused the accident*, if it is alleged that defendant was directly responsible for the infliction of the injury. So far as liability is concerned, if the accident resulted from the negligence of defendant, it is immaterial if the bale was thrown by an employee of defendant, so long as it is alleged that it was caused to be thrown by the defendant."

The Court of Appeals, it will be observed, places the sufficiency of the count upon the inadvertent assumption by it of allegations which the count does not contain. It does not charge the defendant with "negligently permitting the accident to occur through the agency of one of its servants," nor with being "directly responsible for the infliction of the injury." It is charged only with maintaining, contrary to the fact, an unguarded opening, and with the passive alleged negligence of *allowing* the hay "to fall or to be passed or thrown through the sail hole or opening," without notice, warning, signal or instruc-

tion. The declaration contains no allegation, or notice of any claim, that the accident was the result of an affirmative act of the defendant, or of any one for whose act it was responsible, or of any act which was not caused by or associated with the alleged unguarded character of the opening which apparently constituted the *gravamen* of each of the four counts presented.

The proposition of the Court of Appeals might readily be conceded, for present purposes, that it is "immaterial if the bale was thrown by an employee of the defendant, *so long as it is alleged that it was caused to be thrown by the defendant;*" but we search the declaration vainly for such an allegation, or for any which, even without strict regard to the certainty required by the rules of pleading, can be fairly regarded as the equivalent of it.

Stated in few words, the case alleged by the declaration was the maintenance of a dangerous, unguarded opening, through which the defendant allowed hay to fall, pass or be thrown. The case recovered upon at the trial was, simply and only, the negligence of an employee, unalleged, in throwing the straw without notice through an opening, perfectly guarded, and beyond criticism in respect of its construction.

The legal conclusions of the Court of Appeals, unaccompanied by mistaken assumptions in regard to both the pleadings and the evidence, clearly necessitate reversal. Its opinion, at page 49, declares:

> "Plaintiff was not injured as the result of a single breach of duty on the part of his fellow-servant Coleman. . . . The throwing down of the particular bale of straw that injured plaintiff was not the sole negligent and unauthorized act of Coleman; it was what, to the knowledge of the defendant, he had been doing for years. *The continuous and repeated acts of Coleman* were what rendered the place dangerous. While the defendant would not be chargeable with negligence

> if the injury of plaintiff had resulted from Coleman, without the knowledge or permission of defendant, throwing *a single bale* of straw through the opening, defendant will be presumed to have known of the continued and accustomed use which was made of the opening, and to have authorized it to be so used. The distinction consists in defendant's *knowledge of the dangerous use.* It will not be contended that defendant would be liable if it had instructed Coleman to only throw loose straw through the opening; and, that being the customary manner of conveying straw from the loft to the floor below, Coleman on this particular occasion had violated instructions, departed from the custom, and thrown down the bale of straw."

The court thus finds:

1. That Coleman and the plaintiff below were fellow-servants.

2. That defendant was not liable on the ground of the single act of Coleman of throwing through the opening the bale of straw which injured plaintiff.

3. That Coleman's real negligence consisted in throwing down the straw *in its baled form* instead of throwing down loose straw.

4. That throwing the straw down in this, the dangerous manner, was an act which Coleman had been doing for years and to the defendant's knowledge.

If these are the grounds of recovery, or if the judgment can be supported by them, two things are necessary, namely, first, that they should be alleged in the pleadings, and, secondly, that they should be supported by the evidence. It is elementary that a party may not state one case in the declaration and make a different one by his proof. The *allegata* must afford the basis for the *probata.* Boone *vs.* Chiles, 10 Pet., 177. A party can no more recover upon a case proved, but not alleged, than upon a case alleged, but not proved. Foster *vs.*

Goddard, 1 Black, 518. It remains to inquire, therefore, whether the case upon which the Court of Appeals holds the judgment rightly recovered was either alleged or proved.

With respect to the pleadings, the allegation of the first count is that the plaintiff in error "did not protect the said hole or opening in any way whatsoever, but wholly disregarding its duty in the premises, carelessly allowed a bale of the said hay to fall through the said hole or opening upon the said plaintiff, who was at work in the stable below, *and who was wholly ignorant of the said defendant's careless and negligent manner of protection.*" The second count alleges that the plaintiff in error "did not protect the said hole or opening in any way whatsoever, but, wholly disregarding its duty in the premises, carelessly and negligently allowed a bale of the said hay to so fall through the said hole or opening upon the said plaintiff." The third count alleges the duty "to have the said hole or opening so guarded that the bales of hay in the loft above would not pass through said hole or opening and fall upon those engaged in the performance of their duties in the stable below without some warning or notice to those below," and that the plaintiff in error "did not protect the said hole or opening in any way whatsoever, but, wholly disregarding its duty in the premises, carelessly and negligently allowed a bale of the said hay to fall through the said hole or opening upon the said plaintiff. The remaining count alleges that the plaintiff in error "did so carelessly and negligently allow a bale of the said hay to fall, or to be passed, or thrown through the said hole or opening, without any notice or warning or siginal or instruction of any kind to plaintiff, or by any of its said employees, as to fall with great force upon the plaintiff," etc. No one of the counts, it will be seen, alleges negligence in allowing the hay to be passed through in its

bailed form instead of being thrown down loose, nor that it was, or had been, the custom to throw it down in that form, either with or without the knowledge of the plaintiff in error.

In like manner when we come to the evidence, we find it entirely devoid of statement or suggestion, by any witness or in any manner, that the throwing of the hay down in its baled form was unusual, or was by any person or persons engaged in that business considered dangerous, or that it was not the usual or customary method employed in stables and to be expected by stable employees; nor, on the other hand, that it was the custom usually employed in the stable of plaintiff in error, or that it had ever been followed on any previous occasion. The nearest, and only, attempt at evidence approaching this character was the ineffectual attempt to prove, by the defendant in error's witness Diggs, that he had been injured by a bale of hay coming down through that opening, the witness denying that he had been so injured, or that he had so informed the counsel of the defendant in error.

It may, or it may not, be true that, in accordance with the care and prudence exercised by reasonably careful persons in the like calling, the hay should have been loosened from the bale before being thrown down, or that it was unusual or regarded hazardous to throw it down in its baled form, or that Coleman had been in the habit for years, or for any other period, to throw it down without loosening the hay from the bale, or that he had done so for so long and under such circumstances as to render the plaintiff in error chargeable with notice of his conduct in that regard; but, unless all known rules of law, whether relating to pleading, evidence or substantive right are to be wholly disregarded, the facts in this regard must have been set up in the pleadings, and must have been supported by at least some show of evidence, before they can furnish a basis either for the

recovery of the judgment in the trial court, or the sustaining of it by an appellate tribunal.

In Marquette, etc. R. Co. *vs.* Marcott, 41 Mich., 433, it was said that—

> "reason and good sense, as well as law, compel the plaintiff by his declaration in these cases to inform the defendant and the tribunal what the complaint is, and he must not only show that the defendant has been negligent, but must further show in what respect."

A declaration for negligent injury should aver the fact and the manner of negligence.

14 Ency. Pldg. & Pr., 336, and cases cited.

The act done or omitted which constitutes the negligence complained of should be stated with a reasonable degree of particularity.

14 Ency. Pldg. & Pr., 335, and cases cited.

In the second place, the jury should have been instructed to render a verdict for the defendant upon the ground that the injuries received by the plaintiff were caused by the negligence of a fellow-servant.

The record, it is submitted, presents a clear case of non-liability under the "fellow-servant rule."

That persons standing in such a relation to one another, as did the plaintiff and Coleman, are fellow-servants is a proposition well established.

Railway Co. *vs.* Dixon, 194 U. S., 338.
Railroad Co. *vs.* Conroy, 175 U. S., 323.
Railroad Co. *vs.* Poirier, 167 U. S., 49.
Oakes *vs.* Mase, 165 U. S., 363.
Railroad Co. *vs.* Keegan, 160 U. S., 259.
Railroad Co. *vs.* Hambly, 154 U. S., 349.
Railroad Co. *vs.* Baugh, 149 U. S., 368.

Tuttle *vs.* Milwaukee Railway, 122 U. S., 189.
Randall *vs.* Railroad Co., 109 U. S. 478.
Elevator Co. *vs.* Neal, 65 Md., 438.
Wonder *vs.* Railroad Co., 32 Md., 411.
Adams *vs.* Iron Cliffs Co., 78 Mich., 271.
Hogan *vs.* Railroad Co., 49 Cal., 128.

It is equally well settled that one who enters into the employment of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment.

Railway Co. *vs.* Dixon, supra.
Railroad Co. *vs.* Conroy, supra.
Railroad Co. *vs.* Poirier, supra.
Railway Co. *vs.* Keegan, supra.
Railroad Co. *vs.* Baugh, supra.
Tuttle *vs.* Milwaukee Railway, supra.
Randall *vs.* Railroad Co., supra.
Carter *vs.* McDermott, 29 App. D. C., 145.
Looney *vs.* Railroad Co., 24 Appls. D. C., 510.
Wonder *vs.* Railroad Co., supra.
Md. Clay Co. *vs.* Goodnow, 95 Md., 330.
Moret *vs.* Car Works, 99 Md., 461.
Railway Co. *vs.* Conrad, 62 Tex., 627.

The opening complained of in the case at bar was *protected*, and it is perfectly manifest that the accident could not have happened without the intervention of some human agency. Assuming that Coleman did not call out, as he positively swears he did, before throwing down the bale of straw which struck the plaintiff, then the accident was due to Coleman's negligence, consisting in his failure to warn the plaintiff, which negligence is not chargeable to the defendant.

In the case of Railway Co. *vs.* Dixon, supra, this court held that negligence of a local telegraph operator and

station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the injury or death of a fireman of the company without any fault or negligence of the train dispatcher, is the negligence of a fellow-servant of the fireman, the risk of which the latter assumes.

In that case, Mr. Justice Brewer, speaking for the court, amongst other things, said:

> "Tested by this, it is obvious that the local operator was a fellow-servant with the fireman. They were 'engaged in the same general undertaking'—the movement of trains. They were called upon 'to perform duties tending to accomplish the same general purposes,' and 'the services of each in his particular sphere or department were directed to the accomplishment of the same general end.' The fireman who shovels coal into the fire-box of the engine is not doing precisely the same work as the engineer to start or to stop, nor the operator who delivers from the telegraph office at the station to the engineer orders to move, and who reports the coming and the going of trains, and yet they are all working each in his particular sphere towards the accomplishment of this one result—the movement of trains. . . . It is urged that 'it is as much the duty of the company to give correct orders for the running of its trains so they would not collide as it was to see that their servants had reasonably safe tools and machinery with which to work, and a reasonably safe place in which to work,' and hence, that one who is employed in securing the correct orders for the movement of trains is doing the personal work of the employer, and not to be regarded as a fellow-servant of those engaged in operating and running the trains. But the master does not guarantee the safety of place or of machinery. His obligation is only to use reasonable care and diligence to secure such safety. Here the company had adopted reasonable rules for the operation of

all its trains. No imputation is made of a want of competency in either the train dispatcher or the telegraph operator. So far as appears, they were competent and proper persons for the work in which they were employed. A momentary act of negligence is charged against the telegraph operator. No reasonable amount of care and supervision which the master had taken beforehand would have guarded against such unexpected and temporary act of negligence. Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He can not be personally present everywhere and at all times, and in the nature of things can not guard against every temporary act of negligence by one of his employees."

The Dixon case, in its essentials, is on all fours with the present case. There, it will be noted, the negligence complained of was the giving of erroneous information respecting the movement of a train—an act of commission—while here the alleged negligence consisted in the *failure* to give notice of the intended throwing down of a bail of straw—an act of omission.

In Hogan, admr., *vs.* Smith, 125 N. Y., 774, a case closely analogous to the case at bar, the court used the following language:

"The plaintiff's intestate was a longshoreman, engaged with others in loading a vessel with flour. In the square of the hatch and above the hold, the workmen had laid plank and built upon it with bags of flour what is called a 'stool,' upon which four men stood and received the flour lowered to them in slings, and then delivered it to other men who stowed it away. It was customary for the longshoremen to extend the planks upon which the 'stool' was constructed to some distance outside of it, but that precaution had

been omitted, and the deceased was struck by one of the descending loads and killed by falling into the hold. If the plank had been laid in the usual manner, his life would have been saved. The negligence, therefore, upon which the judgment rests is the omission to lay the exterior plank, and the question discussed is to whom that duty pertained and whose negligence caused the injury. It has been charged upon the master for the reason that it is his duty to furnish to his servants a reasonably safe place in which to do their work. But the place which the master furnished was the ship itself, constructed in the usual way, and which became unsafe, not by reason of any careless or negligent plan or manner of construction, as to which no criticism is made, but solely from the way in which the longshoremen did their work. They built the stool and laid the plank for their own convenience in doing the work for which they were hired, and it was not the master's duty to do either. If he was bound to furnish the necessary means and material, there is no suggestion even of a failure in that respect. The injury happened not from an inadequate supply of boards or any defect in those supplied, *but from the negligent manner in which the workmen used them. . . . If it be true that the deceased commenced his labor after the 'stool' had been built and without any knowledge of the omitted plank and the consequent possibility of danger, that simply tends to free him from the charge of contributory negligence, but does not alter the relation of the master to the servants and their work.*"

Indeed, since neither the pleadings allege nor any evidence in the case indicates that the opening in question was not a usual feature of stables, either in its construction or in its manner of use, one or the other of which facts must have been alleged and proven in order to justify recovery founded in any degree upon the opening, the conclusion results, for all the purposes of this case,

that both the construction and the use were customary and usual. The trial court at page 38 of the record, accordingly, and we submit correctly, assumed "the fact that stables usually have such apertures;" but left it to the jury to consider from the evidence whether the defendant in error "did know and consider the fact that it was a stable, and consider the fact that stables usually have such apertures." It is difficult to see upon what principle the defendant in error, who sought and obtained employment as a stableman, can claim ignorance of the existence of apertures "such as stables usually have," or exemption from the duty of ascertaining their location, and of governing himself accordingly, especially in view of his length of service in the stable before the accident occurred. A man of mature age, offering himself to pursue a particular employment, represents himself to have had the necessary experience, and can not after an injury be heard to say that he should have been instructed by his employer in the performance of his duties.

Hayzell *vs.* R. R. Co., 19 App. D. C., 359, 369.
Ry. Co. *vs.* Clark, 108 Ill., 113.
Regan *vs.* Palow, 62 N. J. L., 30.
Sumey *vs.* Holt, 15 Fed., 880.
R. R. Co. *vs.* Boland, 96 Ala., 626.

In brief, either such openings and such manner of using them are or are not common and usual in stables. If not, then in order to charge the plaintiff in error in this action that fact must have been alleged and proved; while, if such as are usually found in stables, then the plaintiff below applying for, entering upon, and exercising his employment in the stable can not be heard, after an injury, to say that he should have been instructed by his employers in regard to a customary equipment or use in establishments of that character.

Returning to the question of fellow-servants, the existence of that relation between Coleman and the defendant in error is not susceptible of dispute. Both had to do with the same pair of horses in the stable, Coleman putting down the straw and hay, bedding, and feeding them (Rec., p. 12), while Brown's duties were those of cleaning, harnessing, and driving them (Rec., p. 18).

Mr. Justice Sanborn, delivering the opinion of the court in the well-considered case of Little Rock and Memphis Railroad Co. *vs.* Barry, 56 U. S. Appeals, 37, said:

> "It is difficult to understand what basis there is in this case under the admitted facts for a finding that a failure to give these notices caused this collision. If we concede that the failure to write the notice, which was verbally given to the conductor and engineer of the extra train at Hopefield, that they must look out for the freight train which was in the bottom between Edmondson and Forrest City (an unreasonable concession except for the sake of argument), and the failure to stop the extra train at Edmondson and notify its conductor and engineer that the freight train was still there, and the failure to send a courier from Forrest City or some other point to the freight train to notify its conductor and engineer that the extra train was coming, constituted negligence, there still remains what seems to us an insuperable obstacle to a recovery on this ground. An injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable. An injury that is not the natural consequence of an act or omission and that would not have resulted but for the interposition of a new and independent cause is not actionable. . . . It was the duty of the engineer and the conductor of the extra train to look out for and to so operate their train that their engine would not crash into the freight train which they knew was on the track before them. It was the duty of the engineer of that

train, who alone could see the track in front of him, to so govern the speed of his engine that he could at any time stop it within the range of his vision. It was the duty of the crew of the freight train to place torpedoes on the track at least fifteen telegraph poles in the rear of their train when it stopped at the place of the collision and to station a flagman ten or twelve telegraph poles behind that train. The railroad company had the right to presume that its servants on these trains would obey its rules and discharge these duties, and it had the right to act upon that assumption. It was its right to calculate the natural and probable result of its acts and omissions upon this supposition. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men on the theory that their associates and servants will either disregard their duties or violate the laws. Now, no one who reckoned on the faithful discharge of their duties by these employees could reasonably have anticipated this fatal collision as either a natural or probable consequence of the failure to give these notices. Nor could it have been the result of such failure had not the unforeseen negligence of the engineer of the extra train and the gross and unexpected carelessness of the crew of the freight train intervened to interrupt the natural sequence of events, to turn aside their course, and to prevent the safe operation of these trains, which was the natural and probable result of the rules and the orders which the defendant gave. It was the gross negligence of these servants, which no one could anticipate, that constituted the intervening and proximate cause, without which this collision could never have been, and it is to this, and not to the failure to give the notices, in our opinion, that this accident must be attributed under the maxim Causa proxima, non remota, spectatur."

In Pease, Admx. *vs.* Railway Co., 61 Wis., 163, the court used this language:

> "In answer to questions submitted, the jury found that the injury to the deceased was caused by the want of ordinary care on the part of the conductor in signaling ahead without a signal from the brakeman. This finds the precise act of negligence which occasioned the injury; and it is plain that it was not because of the failure to have the chains repaired, assuming that negligence, under the circumstances, could be predicated upon that fact—a point which in our minds admits of grave doubt. Be this as it may, certainly it was the negligence in giving the signal, not the failure to repair the chains, which was the direct proximate cause of the injury. The acts are distinct and independent, having really no connection with each other, the failure to repair being but remote, while the negligence in giving the signal was proximate, within the meaning of the cases. So, without intending to disturb the rule laid down by this court to which the learned counsel of the plaintiff refers, which is held to impose the duty upon the defendant of supplying and maintaining suitable cars and appliances for operating its road, and to take due care and use all reasonable means to guard against defects in its cars and locomotives which endanger the lives and limbs of its employees while in the performance of their duties, it seems to us this rule of law does not cover this case, inasmuch as the failure to repair the chains was not the cause of the accident. It was another independent act of negligence which caused it."

In Railroad Co. *vs.* Perriguey, 138 Ind., 414, the court said:

> "Suppose this suit were against Ferris for the damages resulting to appellant's engines or by the appellee for his injuries, could he assert, with reason, that his negligence was not the proximate cause of the collision? Suppose the conduct of

Ferris in promoting the collision to have been wanton or wilful, could it be said that the prior negligence of the company was the proximate cause of the collision? We believe not. The movement of the train under the management of Ferris was the independent wrongful act of a responsible person; such act of Ferris was not induced by the act of the appellant, nor did the act of Ferris so operate on the act of the appellant as to cause appellant's act to produce the injury. If it had so operated, according to the authority we have cited, responsibility would not attach to the appellant's act. The absence of the headlight was not the cause of the injury. Such absence was but an incident to the appellee's failure to avert the collision. We can not escape the conclusion that the wrongful act of Ferris was the immediate cause of the injury. Regarding the appellee and the engineer Ferris as fellow-servants, as it is agreed we must, can we hold the appellant responsible for the wrongful act of Ferris? The appellee contends, as we have shown, that the assumption of the negligence of a fellow-servant does not include his negligence where it concurs with the negligence of the master in producing injury. We are advised of the rule, as we have held it in Rogers *vs.* Leyden, 127 Ind., 50. The only question we entertain is as to the application of the rule. Where the defect in the machinery, or the want of skill of a fellow-servant, or the unsafety of the place where occupied, are within the knowledge of the master, are not known to the servant, and are the immediate cause, or one of the concurring immediate causes of the injury, there is not, and ought not to be, any doubt of the application of the rule that the master may not hide his liability behind the concurring act of his employee. . . . We have found that the act of the appellant was not a proximate cause of the injury; that the act of Ferris was the immediate cause of the injury, and it follows that the two acts were not concurrent in causing the injury. We doubt if a case can be found where an

act of the master, though negligent but not causing injury or concurring as a cause of injury, is coupled with a wrongful act of a servant and made the basis of recovery for such injury. . . . If the rule contended for by appellee should prevail, the master would become an insurer of the safety of his servant against the negligence of a fellow-servant, however gross, if the negligence of the master, however slight and however remote from the cause of injury, could be discovered to have offered an opportunity for the negligence of such fellow-servant."

And see, also, opinion of court on petition for a rehearing in this case.

Said the court in Trewather *vs.* Buchanan, etc., Co., 96 Cal., 494:

"We do not think the verdict and judgment can be sustained, even if it be admitted that the appliances complained of were as defective as it is claimed they were. The immediate and proximate cause of the injury sustained by plaintiff was very clearly shown to have been the negligence of his co-employee; and this, as we understand it, is, in substance, the averment of the complaint. Nothing but carelessness can account for the fact that the engineer allowed the bucket to be hurled against the sheave, twenty-three feet above the upper platform, whether he supposed he was hoisting a man or something else. But the rule is, that where the promoting cause of the injury is the negligence of a fellow-servant, no recovery can be had, even though the machinery or appliances be defective. This was so declared in Kevern *vs.* Providence Gold, etc., Min. Co., 70 Cal., 394, where the court said: 'The proximate cause of the injury is the object of inquiry, and when discovered must be regarded and relied on.' Hayes *vs.* Western R. R. Corp., 3 Cush., 274. Even where machinery is defective, so that otherwise a recovery might be had for an injury received, yet if the promoting cause of the injury is the negligence of a fellow-

> servant, no recovery can be had. Wood on Master and Servant, 812. The same rule must apply where the appliances for doing work are defective."

If the declaration in the present case does not aver, as in the case last cited, that the immediate and proximate cause of the accident was the negligence of the plaintiff's co-employee, it is only because the defendant in error, as above pointed out, has been allowed, over objection, to recover upon a cause of action different from that alleged in his declaration. But, whether apparent upon the face of the declaration or otherwise, the law governing the right to recover is the same where, as in this case, the fact is as unquestioned as if pleaded.

To like effect are—

American Bridge Co. *vs.* Seeds, 144 Fed. Rep., 605.
Garnett *vs.* Phœnix Bridge Co., 98 Fed. Rep., 192.
McGough *vs.* Bates (R. I.), 42 Atl. Rep., 873.
Brown *vs.* L. & L. Co., supra.
Carr *vs.* Construction Co., 48 Hun, 266.
Kevern *vs.* Mining Co., 70 Cal., 392.
Henry *vs.* Railway Co., 76 Mo., 288.
Railroad Co. *vs.* Brown, 91 Va., 668.
Lutz *vs.* R. Co., 6 New Mexico, 496.
Enright *vs.* R. Co., 93 Mich., 409.
Hayes *vs.* R. Co., 57 Mass., 274.
Borck *vs.* Bolt & Nut Works 111 Mich., 129.
Maryland Clay Co. *vs.* Goodnow, supra.
Cooley on Torts, 3d ed., 103, 104.

In Railway Co. *vs.* Greenwood, 89 S. W. Rep., 810, it was said:

> "Negligence must be shown by affirmative proof, and to fix the liability of a master for injuries sustained by a servant his negligence must not only be shown, but such negligence must be proved by affirmative evidence to have been the proximate cause of the injury."

Where injuries are sustained by an employee through the negligence, both of co-employees and of the master, the latter is not liable, unless, without his negligence, the accident would not have happened.

Whittaker *vs.* Canal Co., 49 Hun, 400.
Hall *vs.* Railroad Co., 49 Hun, 373.
McCabe *vs.* Brainard, 17 N. Y., App. Div., 45.

Although the machinery is defective, so that otherwise a recovery might be had for an injury received, yet if the promoting cause of the injury is the negligence of a fellow-servant, no recovery can be had.

Gilman *vs.* Eastern R. Corp., 10 Allen, 233.
Hayes *vs.* Western R. Corp., 3 Cush., 270.
R. Co. *vs.* Hughes, 49 Miss., 258.
R. Co. *vs.* Thomas, 51 Miss., 637.

In Searles *vs.* Railway Co., 101 N. Y., 662, the court used this language:

> "Where the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause; and he must also fail if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of the evidence. The jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the negligence and unskillfulness of the defendant is not sufficient."

In an action for personal injuries alleged to have resulted from the failure of the master properly to warn and instruct the servant, a recovery can be had only

where the master's negligence was the proximate cause of the injury.

26 "Cyc," 1169.

The defendant, it is respectfully submitted, discharged its full duty to its employees when it protected the opening complained of in such a manner as to render it impossible for the straw and feed kept in the loft to fall down through the opening and injure them while they were engaged upon their work in the stable below. Nothing further was required of it in order to render the stable reasonably safe.

It can not be said that it was incumbent upon the defendant, when the plaintiff entered its employ, to notify him of the custom of throwing down straw through the opening. The *presumption* was that his fellow-servant, Coleman, the man whose duty it was to throw down the straw, would discharge his duty with due care and caution and the defendant had the right to act upon that presumption. The testimony, undisputed, is that it was his invariable custom to do so (Coleman, 13, 14; Heffner, 19), and no attempt was made to show that he had ever been known to fail in performance of the duty to give ample and safe warning on any occasion except that of the accident in suit. On that occasion Coleman's testimony is that he gave it, while that of defendant in error is that he did not hear it (Rec., p. 22), and that his hearing was then imperfect (Rec., p. 23).

The Court of Appeals seems to have held it negligence warranting recovery to permit baled hay to be thrown down, even with invariable and due warning.

In Railroad Co. *vs.* Baugh, supra, it was laid down that there could be no recovery in such a case as this unless the negligent act complained of constituted a breach of some "positive duty" owing by the master to the servant, such as that of taking fair and reasonable

precautions to surround his employees with fit and careful coworkers, and the furnishing to such employees of a reasonably safe place to work and reasonably safe tools or machinery with which to do the work.

The failure of the defendant to instruct the plaintiff, at the time he went to work for it, respecting the use of the opening for the purpose of throwing down straw used for bedding for the horses, especially in the absence of allegations or proof that it was not a customary and usual use in all similar establishments, did not constitute a breach of any "positive duty" of the defendant toward the plaintiff.

There was no reasonable duty upon the defendant to *anticipate* that Coleman would throw down an unopened bale of straw through the opening without giving warning to his co-employees—*negligently*—especially when Coleman, at that time, had been throwing down straw through the opening *without negligence*, for about six years.

In the case of American Bridge Co. *vs.* Seeds, 144 Fed. Rep., 605, it was declared that:

> "There is no duty upon a master to *anticipate* breaches of duty on the part of his servants, but he may lawfully reckon the natural and probable result of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practicable basis for the measurement of the acts, rights, or remedies of mankind. . . . It is the duty of the master to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their work and a reasonably safe place in which they may render their service, and this duty may not be so delegated by him that he may escape liability for its breach. Nevertheless, this duty has its rational and legal limits. It does not extend to the guarding of the

safety of a place or of a machine against its negligent use by the servant. *The risks that a safe place will become unsafe, or that safe machinery will become dangerous by the negligence of the servant who uses them, is one of the ordinary risks of the employment which the servants necessarily assume when they accept it. It is a risk of operation, and not of construction or provision, and the duty to protect place and machinery from danger arising from negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them.*"

To the same effect are:

Little Rock, etc., R. Co. *vs.* Barry, 56 U. S. Appeals, 37.

Garnett *vs.* Bridge Co., 98 Fed. Rep., 192.

Said the court in Fairbanks, Morse & Co. *vs.* Walker, 160 Fed. Rep., 896:

"Just as employees may rely upon the performance by the employer of his positive duties to them, so may he rely upon their exercise of ordinary care in doing their work, and neither is required to anticipate and make provision for the other's default."

"Neither is the duty of maintaining a safe place so absolute as to charge the master with the injuries to servants resulting from the place becoming unsafe through the negligent performance of the work there to be done."

Coal Co. *vs.* Nance, 165 Fed. Rep., 44.

In Morgan Construction Co. *vs.* Frank, 158 Fed., 964, it was held that—

"the duty of a master to provide a safe place for the servant to work does not extend to a place made dangerous by the very work in which the workmen are engaged, whether by its inherent character, *or resulting from negligent performance by the workmen or those who stand in law in the relation of fellow-servants to them.*"

In Fowler *vs.* Railway Co., 61 Wis., 159, it was said:

> "The evidence is that this engine was as safe for switching purposes as any other if used with the proper care. It would be an extremely hard rule upon railway companies or other employees to require them to furnish to their employees such machinery or other appliances for their use as could not injure them by their own negligence or want of ordinary care. Such a rule would require them to anticipate and provide against the consequences of all possible acts of negligence of their employees. This engine was perfectly safe if prudently used as a switch engine. It is perfectly clear that the injury of the plaintiff was caused by the negligence of the engineer or his brakeman in running the engine upon him in the manner they did without notice, signal, or warning, and they were his fellow-servants in the same general work, and he can not recover on account of their negligence. . . . Here he was not injured in consequence of any danger in the prudent and careful use of this engine, or of its peculiar construction, but solely by the negligence of his co-employees. The law applicable to such a case is so indisputable and well established that the citation of adjudicated cases is not necessary."

In Siddall *vs.* Pacific Mills, 162 Mass., 378, the court said:

> "Ordinarily, the employer is not called upon to instruct a young and inexperienced person in regard to dangers which can only result from the negligence of fellow-servants. It is not to be presumed that others will neglect their duties, and a boy can not expect to be instructed as to what to do in a situation which is not to be expected in the ordinary course of the business, and which can only exist through the fault of another. . . . In the present case there is no evidence to warrant a finding that he owed the plaintiff such a duty.

> The danger of such an injury was very remote and improbable. It could only come from negligence which the employer had no reason to expect."

The master has the right to *assume* that his servants will adopt a reasonably proper method of performing their work.

Supply Co. *vs.* Kroenig, 167 Ill., 560.

The master has a right to assume that his servants, being competent, will not be negligent, and it is not his duty, on employing a servant, to warn him against possible or probable dangers in case they are negligent.

26 "Cyc," 1170.

In Klos *vs.* Ore & Iron Co., 77 App. Div., 566, it was held that the defendant had a right to assume that the plaintiff's fellow-servants, whose competency was not questioned, would not be negligent in their work, and that it was not necessary for it to inform the plaintiff of possible or probable dangers that would arise in case of negligence on the part of his fellow-employees.

In the case of Leubke *vs.* R. Co., 63 Wis., 91, it was laid down that where a company had provided a watchman to guard an employee from danger while at work under a car, it was not liable to him for injury resulting from their failure to warn him of an approaching train which struck such car and injured him. In its opinion the court said:

> "True, no written or published regulation of the company to that effect (requiring trainmen to watch) was shown; neither did any witness in the employ of the company testify that he had been charged by an officer of the company with the duty of watching for the safety of other employees working under cars upon the track; but many such witnesses testified that their duty in that behalf was well understood by them and other employees of the company. It was a sort of common law of the company, obligatory upon its

employees, and as thoroughly understood by them as though it had been embodied in the printed regulations and read by the officers of the company to them. It thus became a rule or custom of the company as well as an understanding between its employees."

Said the court in Lundquist *vs.* Duluth Street Railway Company, 65 Minn., 387:

> "It is true, as claimed, that it was the duty of the defendant to use reasonable care to provide a safe place in which the plaintiff was required to work, and that this duty, like the duty to furnish safe machinery and proper appliances for doing the work, was an absolute one, which the defendant could not delegate, so as to be relieved from liability in case the duty was neglected. *But if the safe place or safe machinery which the master has furnished and keeps in repair is made unsafe by the negligence of his servants, whom he has selected with due care, in using or operating the place or machinery, and one of his servants is injured thereby, such negligence is that of a fellow-servant.* Foster *vs.* Minnesota C. Ry. Co., 14 Minn., 270 (360); Collins *vs.* St. Paul & S. C. R. Co., 30 Minn., 31, 14 N. W., 60; Connelly *vs.* Minneapolis Eastern Ry. Co., 38 Minn., 80, 35 N. W., 582; Randall *vs.* Baltimore & O. R. Co., 109 U. S., 478. . . . The plaintiff was injured by the negligence of the motorman in failing to give any signal of the approach of the car, or to slacken its speed, as it was his duty to do. *But such duties did not appertain to the work of furnishing, constructing, or equipping a safe place for work, or safe machinery for the execution of the work, but to the operation of the street railway; hence, his negligence in the premises was that of a fellow-servant,* and the plaintiff can not recover."

In Southern Pacific Company *vs.* Pool, 160 U. S., 438,

Mr. Justice White, in delivering the opinion of the court, said:

> "Nor can these acts of negligence be legally excused by conceding that Pool's conduct, whether of commission or omission, was caused by the reliance placed by him on the warning which he expected would be given by Rice, the car repairer, who remained on the side of the track. Either Rice was the agent of Pool or of the corporation. If he was the agent of the former, of course Pool can not recover for an injury suffered by him in consequence of the negligence of his own agent. If Rice, in giving the warning, was the servant of the corporation, his negligence gave rise to no cause of action on behalf of Pool, since in any and every view of the law of fellow-servant, Rice and Pool were such servants."

In Railroad Co. *vs.* Charless, 162 U. S., 363, the plaintiff was on a moving hand-car, and was injured by the car colliding with the freight train approaching from the opposite direction. One of the grounds of negligence alleged was that the engineer of the freight train failed to give warning of its approach. Held, that this was the negligence of a fellow-servant, for which the defendant was not responsible.

Mr. Justice Peckham, delivering the opinion of the court in this case, said:

> "We think it was error to submit to the jury the question of the negligence of the employees on the extra freight train in failing to give the signals of its approach. This failure, assuming that it constituted negligence, was nothing more than the negligence of coservants of the plaintiff below in performing the duty devolving upon them. The principle which covers the facts of this case was laid down in Randall *vs.* Baltimore and Ohio Railroad, 109 U. S., 478, and that case has never been overruled or questioned. The Ross case, 112 U. S., 377, is a different case, and

was decided upon its own peculiar facts. See Baltimore and Ohio Railroad *vs.* Baugh, 149 U. S., 368, 380. Among the latest expressions of opinion of this court in regard to views similar to those stated in the case in 109 U. S. (supra), is the case of the Northern Pacific Railroad Company *vs.* Hambly, 154 U. S., 349. It seems to us that the Randall and the Hambly cases are conclusive, and necessitate the reversal of this judgment."

Again, in Martin *vs.* Railroad Co., 166 U. S., 403, it was said:

"We do not perceive that the doctrine as to the duty of the master to furnish a safe place for the servant to work in has the slightest application to the facts of this case. There is no intimation in the evidence nor is any claim made that the hand-car upon which the plaintiff was riding was not properly equipped and in good repair, and in every way fit for the purpose for which it was used. It was a perfectly safe and proper means of transit in and of itself from the station at Albuquerque to the point where the plaintiff was going to work. The negligence of the section foreman in failing to note the approaching train and to give the proper warning, so that the car might be taken from the track, was not the neglect of the defendant in regard to the performance of any duty which as master it owed the plaintiff. If the car were rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow-servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south."

Mr. Justice Gray, delivering the opinion of the court in Randall *vs.* Railroad Co., supra, used this language:

"A railroad yard, where trains are made up, necessarily has a great number of tracks and

switches close to one another, and any one who enters the service of a railroad corporation, in a work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night and the plaintiff had not been in this yard before his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care, and it was unnecessary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track. . . . This action can not, therefore, be maintained for the negligence of the engineman in running his engine too fast or in not giving due notice of its approach."

The duty to instruct and warn as to dangers arising from the execution of the general details of the work is generally held to pertain to the duties of the servants as between themselves, so that a failure or negligence in regard thereto is that of a fellow-servant, exempting the master from liability.

26 "Cyc," 1338, 1339. And see defendant in error's testimony, Rec., p. 22.

See, also—

Miller *vs.* Railroad Co. (N. J.), 31 A. and E. R. R. Cases, N. S., 639.

Jenkins *vs.* R. Co., 39 S. C., 507.

Moret *vs.* Car Works, 99 Md., 471.

Kemmerer *vs.* R. Co., 81 Hun, 444.

Hussey *vs.* Coger, 112 N. Y., 614.

Cullen *vs.* Norton, 126 N. Y., 1.

Potter *vs.* R. Co., 136 N. Y., 77.

Melchert *vs.* Brewing Co., 140 Pa. St., 448.
Zurn *vs.* Tetlow, 134 Pa. St., 213.
Allison Mfg. Co. *vs.* McCormick, 118 Pa. St., 519.
Keats *vs.* Natl. Heeling Mach. Co., 65 Fed. Rep., 940.
R. R. Co. *vs.* Smithson, 45 Mich., 212.
Kohn *vs.* McNulta, 147 U. S., 238.

In a large stable, where a number of horses are kept and fed and where straw and feed is kept, to assert that it is necessary to warn an employee of the possibility of such an accident as the one which happened to the plaintiff, is to say that the master must be an *insurer* of the safety of his servants.

As more than once already noted, there is not a scintilla of evidence in the record tending to prove that there was anything *unusual* or *abnormal* about the existence of such an opening in the defendant's stable as the one complained of, nor is there any evidence to show that it was *unusual*, or *negligent*, to throw down straw or feed through said opening. Wherefore, we submit it must be presumed that the opening was of a character usually found in such a stable and used as a convenient means of transferring straw and feed, stored in the loft to the floor below, as needed. The trial court took judicial notice of the fact that *"stables usually have such apertures"* (Rec., p. 38).

In District of Columbia *vs.* Moulton, 182 U. S., 576, the grievance complained of was that the District had left upon a public highway known as Park street a large steam roller, which was calculated to frighten horses, and it appeared from the evidence that there was a large canvas cover over the steam roller, and that the horse of the plaintiff in error, while being driven along the street, became restive from the "flapping of the canvas cover," reared, and upset the vehicle, throwing the plaintiff out and injuring him.

The opinion of the court was delivered by Mr. Justice White, who said, *inter alia:*

> "The sole negligence complained of in the declaration was averred to consist in keeping the steam roller in question on Park street for the space of two days, so as to be a public nuisance and dangerous to travelers passing along said street with their carriages and horses. There was no allegation that the roller in consequence of its being disabled presented such a changed appearance that the danger of its frightening an animal was enhanced. Nor was there any averment that the negligence was committed in the use of the canvas covering, and no proof was offered on the trial tending to show that such a cover was not the means usually employed to protect steam rollers from the weather when they were lawfully on the street, and for the time being not in use."

There being no averment in the declaration of the plaintiff, and no proof tending to show, that the existence, or the use of the opening in question for the purpose of throwing down straw from the stable loft, constituted negligence, the foregoing language of Mr. Justice White applies with entire force, we submit, to the case at bar.

The master is under no obligation to instruct or warn the servant as to normal or ordinary risks.

Labatt, M. & S., sec. 239.

> "It is presumed that the servant assumed all the usual and ordinary hazards of the business, and the force of this presumption must be overcome by the servant."
>
> Wood, Master and Servant, sec. 382.

A servant assumes all the ordinary and usual risks and perils incident to the employment, whether it be dangerous or otherwise, and also all risks which he knows, or

may, in the exercise of reasonable care, know, to exist, unless there is some agreement to the contrary.

26 "Cyc." 1177–1180.

The principle is recognized by the authorities that before the master can be held liable on the ground of a breach of the duty to warn or instruct, he must be shown to have had knowledge, actual or constructive, of the servant's ignorance and inability to appreciate the danger alleged to exist.

In the case of Railway Company *vs.* Watts, 63 Texas, 549, it was said:

> "By seeking and accepting the service the appellee assumed all the risks incident to the employment. It was not the duty of appellant to instruct him respecting the rules, regulations, and usages by which the service was governed, unless asked for such information, unless the employee was known to be an inexperienced person in the business, and in its transaction subject to danger not open to his observation, known to the employer."

In Rooney *vs.* Cordage Co., 161 Mass., 160, the court said:

> "It is contended by the plaintiff that the defendant was negligent in not warning him of the danger. The rule of law invoked by the plaintiff applies only when there is a danger known, or which ought to be known, to the employer, of which the employee through youth or inexperience is ignorant, and which the employee can not reasonably be expected to discover by the exercise of ordinary care."

A master need not warn a servant of a risk naturally incident to the employment, unless he knows that the servant is ignorant thereof.

26 "Cyc," 1167.

The duty of the master to instruct and warn the servant—

> "only arises as to dangers which the master knows or has reason to believe the servant is ignorant of. It does not arise as to dangers known to the servant, or that are so open and obvious as that by the exercise of care, he would know of them."
>
> Yeager *vs.* Ry. Co., 93, Iowa, 1.

> "The fact that an employee was injured because he was inexperienced and ignorant of the dangers of the work in which he was engaged, does not make the employer liable unless the latter knew or ought to have known of such inexperience and ignorance and of such danger, and failed to instruct or warn the employee."
>
> Klochinski *vs.* Luber Co., 93 Wis., 417.

In Way *vs.* Railroad Co., 40 Iowa, 341, the court said:

> "At the same time he (the servant) must make a reasonable use of his senses, and if a defect is apparent and patent, and would have been discovered by the exercise of reasonable and ordinary care, in view of the position which the brakeman occupies, the law conclusively presumes that he possesses the knowledge which reasonable attention would furnish. Any other rule would be opposed to, rather than promotive of, the interests of humanity, as it would encourage the grossest inattention, and would reward it the highest when it produced the profoundest ignorance."

Said the court in Crown *vs.* Orr, 140 N. Y., 450, reversing a judgment for the plaintiff:

> "The law imposes upon him (the servant) the duty of self-protection and always assumes that this instinct, so deeply rooted in human nature,

will guard him against all risks and dangers incident to the employment or arising in the course of the business of which he has knowledge or the means of knowledge. If he voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk and to waive any claim for damages against the master in case of personal injury to him. Thomp. on Neg., p. 1008; Haskin *vs.* N. Y. C. & H. R. R. Co., 65 Barb., 129; affd. 56 N. Y., 608; Jones *vs.* Roach, 9 J. & S., 248. This principle applies to the plaintiff, though he was not at the time of full age. Like any other servant, he took upon himself the ordinary risks of the service and all dangers from the use of machinery which were known to him or obvious to persons of ordinary intelligence. DeGraff *vs.* N. Y. C. & H. R. R. Co., 76 N. Y., 125; King *vs.* B. & W. R. Co., 9 Cush., 112. He is bound to take notice of the ordinary operation of familiar laws and to govern himself accordingly, and if he fails to do so the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person so using them, and if he neglects to do so he can not charge the consequences upon the master."

In Osborne, Admr., *vs.* Coal Co., 97 Wis., 27, the court states the law thus:

"It does not appear how long experience the decedent had had at the employment at which he was engaged. But he was an adult man, and must be presumed to have known and appreciated all such risks of the employment as were open and obvious to a man of ordinary apprehension. . . . He is deemed to have assumed the risk of all such dangers of the employment as he either knew or could have discovered by the exercise of reasonable attention. Such risks he fails to appreciate at his own peril. As against him, the defendant had the right to carry on its business in such

> place and manner, and with such appliances as best suited its choice or interests, even if some other would have been safer, so that it did not violate the law of the land, nor expose him to dangers which he did not know and could not learn by the exercise of reasonable attention."

The employer is not an insurer. It is the duty of the employees to use reasonable care to ascertain the ordinary perils of the service which they voluntarily enter, and they are presumed to take service with knowledge of such perils as are open and obvious.

O'Neal *vs.* Ry. Co., 132 Ind., 110.

In Wood *vs.* Heiges, 83 Md., 257, it was said:

> "The master is, therefore, not an insurer of the servant's safety. He can not be bound for his servant's injury, without being chargeable with some neglect of duty, measured by the standard of ordinary care. On the other hand, the servant is under an obligation to provide for his own safety when danger is either known to him or discoverable by the exercise of ordinary care. He must take ordinary care to learn the dangers which are likely to beset him.'"

Said Mr. Justice Bradley, speaking for the court in the aforecited case of Tuttle *vs.* Milwaukee Railway:

> "Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw-bars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only on the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it; for it is one of those things which happen, in the course

of his employment, under such conditions as existed here. Without attempting, therefore, to give a summary of the evidence, we have no hesitation in saying that the judge was right in holding that the deceased, by voluntarily assuming the risk of remaining on the inside of the drawbar, brought the injury upon himself, and the judge was right, therefore, in directing a verdict for the defendant. We are led to this conclusion, not only on the ground that the deceased, by his own negligence, contributed to the accident, but on the broader ground, already alluded to, that a person who enters into the service of another in a particular employment assumes the risks incident to such employment. Judge Cooley announces the rule in the following terms: 'The rule is now well settled,' says he, 'that, in general, when a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he can not hold the master responsible, but must bear the consequences himself. The reason most generally assigned for this rule is, that the servant, when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, when making their negotiations, fixing the terms and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing upon their stipulations. As the servant then knows that he will be exposed to the incidental risk, "he must be supposed to have contracted that, as between himself and the master, he would run this risk."' The author proceeds to show that this is also a rule of public policy, inasmuch as an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but it would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct and negligence of others

> in the same service; and in exercising such diligence and caution, he would have a better security against injury to himself than any recourse to the master for damages could afford. This accurate summary of the law supersedes the necessity of quoting cases, which are referred to by the author and by every recent writer on the same subject. Its application to this case is quite clear. . . . Tuttle, the deceased, entered into the employment of the defendant as a brakeman in the yard in question, with a full knowledge (actual or presumed) of all these things—the form of the sidetracks, the construction of the cars, and the hazards incident to the service. Of one of these hazards he was unfortunately the victim. The only conclusion to be reached from these undoubted facts is, that he assumed the risks of the business, and his representative has no recourse for damages against the company."

A cylinder was set in a square hole in a floor, leaving a space of about eighteen inches between a corner of the hole and the side of the cylinder. An employee fell into the hole and was injured. The hole could be seen by any one looking on the floor. The overwhelming evidence, though contradicted, was that the place was well lighted. The employee testified that she did not see the hole and did not look on the floor. Held, that the employee assumed the risk of injury as a matter of law.

McCafferty *vs.* Dyeing & Cleaning Co., 80 N. E., 460.

In Butler *vs.* Frazee, 25 App. D. C., 392, it was said:

> "It is inconceivable that this adjustment could have escaped the observation of the plaintiff during more than two months of this constant employment. Under such circumstances she must be presumed to have had knowledge of a condition which would necessarily have become known through the ordinary exercise of her faculties. The defect being obvious to one of the plaintiff's

intelligence and experience, the defendant was under no duty to instruct her in the performance of her services, or to correct it in the absence of any complaint or request made by her."

"In law, what a man ought to know, he does know."

McDugan *vs.* R. Co., 31 (N. Y.) Supp., 135.

The court, in Murphy *vs.* Rockwell Engineering Co., 70 N. J. L., 374, laid down the law thus:

"A doctrine, limiting the adult workman's assumption of ordinary risks to such as his experience had taught him to anticipate, would cast upon the employer the duty of probing the previous life of every such employee and be utterly impracticable as a rule of responsibility. The law places upon every adult the duty of first ascertaining the nature of the occupation in which he proposes to engage and then determining for himself whether his experience is adequate for his security against the dangers ordinarily incident thereto. This duty rests upon him, not only when he enters into employment, but also at every stage of his service, requiring him to refuse to act in matters beyond the range of his experience, or else to take the risk of the dangers naturally incident to his act. The employer can not be held responsible for such dangers in the absence of notice that the experience of the workman was less than his contract implied."

There is no suggestion here that, at the time the plaintiff was employed by the defendant, he was an ignorant or inexperienced stableman, or did not know that stables usually have such apertures as the one in question and that they are used for the purpose of throwing down straw or feed, from time to time. There is evidence tending to show quite the contrary. The defendant had every reason to believe, on January 9, 1904, when the

plaintiff was regularly employed by it, that he was thoroughly familiar with the interior arrangement of large stables, and with stable usages and customs; for the plaintiff, at that time, had, for three years, worked for the Independent Oil Company, in the very same capacity, and he was employed by the defendant, on the recommendation of the Independent Oil Company (Rec., p. 24). Moreover, according to Coleman, the plaintiff's own witness—

> "Brown was at the stable before he was regularly employed, on extra work; . . . before Brown was regularly employed by the defendant he came to the stable regularly mornings and didn't have anything to do, and he would go back again" (Rec., p. 16).

III.

We respectfully submit, in the next place, that the trial court should have directed the jury to return a verdict for the defendant, because of the contributory negligence of the plaintiff in getting under the opening in question, after being warned by Coleman.

It will be seen that Coleman, whom the plaintiff offered as a witness in proof of his case, and thereby represented to be worthy of belief, testified with great positiveness and emphasis, that before throwing down the bale of straw, he called out to Brown to "look out below," and that Brown replied "all right;" that he, Coleman, then proceeded to lift the bale of straw up on the wainscoting around the opening and "just as he lost his reach on it," Brown appeared under the hole, "seemed to draw himself right up," and the bale struck him (Rec., p. 13).

Analysis of the testimony given by the plaintiff will disclose no specific, direct, indubitable contradiction of this positive, unequivocal testimony of Coleman. The

plaintiff's testimony, it is submitted, amounts to nothing more than a contradiction of Coleman's testimony as to the warning by implication, and considering that Coleman had been called and accredited by the plaintiff as a witness in the case, such a contradiction was insufficient to warrant the submission of the case to the jury.

Furthermore, it does not clearly appear from the testimony of the plaintiff that he did not know of the existence of the opening complained of, and that it was used for the purpose of throwing down straw into the stable below. Nowhere in his testimony does the plaintiff say, affirmatively, that he did not know before the happening of the accident that the opening was used for this purpose.

The court will recall that the plaintiff's testimony on this point was as follows (Rec., pp. 22–23):

> "Q. Did you have any idea that the hole was used for that purpose? A. I never noticed that hole.
>
> Q. What was that answer? A. I never noticed that hole. It was so dark that you could hardly see anything.
>
> Q. Never noticed the hole? A. Never noticed it; no conception of any such place as that.
>
> Q. No conception? A. No."

Is it possible that such indirect, ambiguous statements by the plaintiff—who was rendered "entirely unconscious" by being hit by the bale of straw, and who could not even remember the date of the accident—with respect to his prior knowledge of the use of said hole for this purpose, afforded adequate ground for the action of the court below, in the face of the positive testimony of Coleman and the other witnesses in the case?

Coleman's testimony was that he pointed out the hole to Brown before he went to work for the defendant, and told him it was used for throwing down straw; that he frequently saw Brown in the stable prior to the accident,

in the daytime, and that the hole could be seen by anybody entering the stable in the daytime.

Even if he had not done so, such openings being used in stables, the defendant, not only offering himself for employment as a stableman, but being actually and for years experienced in this calling, was bound to acquaint himself as to the existence and location of the aperture in this stable.

Hunt testified that the hole could be seen by one walking in the aisle between the stalls; and that Coleman stated immediately after the accident that he called to Brown before throwing down the bale of straw.

Parsells testified that he took Brown to the stable and explained to him his duties and showed him the stalls in which he was to keep his horses, before he went to work for the defendant, in the daytime (and this Brown did not deny); that he subsequently saw Brown in the stable, in the daytime, at least a dozen times, before the accident; and that the opening could be seen by a person walking between the stalls very plainly.

Kennedy also said he had seen Brown in the stable before the accident in the daytime.

It will be further observed that the plaintiff, at the time he was struck by the bale of straw, was going toward "I" street to the office to turn in.

Does this not show contributory negligence? The opening was not in the direction of "I" street from the stalls in which the plaintiff kept his horses. If the plaintiff, therefore, passed under the opening in going toward "I" street, after Coleman gave the warning, he did so unnecessarily, and has only himself to blame for the accident which resulted therefrom.

IV.

The second assignment of error raises precisely the same questions as those raised by the first, and need not be further discussed.

The third assignment of error is grounded upon the refusal of the trial court to grant the defendant's fifth instruction.

This instruction should also have been given, as the proposition of law which it embodies is unquestionably correct. The very same instruction was given the jury in the case of Doyle *vs.* Trust Co., 140 Mo., 1; and a similar instruction was given in Railway Co. *vs.* Barrett, 166 U. S., 617.

It was of the highest importance to have the jury understand and appreciate that the defendant was not an *insurer* of the plaintiff's safety while at work for it.

No proposition of law is more firmly established.

Railway Co. *vs.* Dixon, supra.
Railroad Co. *vs.* Baugh, supra.
Armour *vs.* Hahn, 111 U. S., 313.
Butler *vs.* Frazee, supra.
Wood *vs.* Heiges, supra.
Moret *vs.* Car Works, supra.
O'Neal *vs.* Ry Co., supra.
Harley *vs.* Buff. Car. Man. Co., 142 N. Y., 31.
Brown *vs.* L. & L. Co., supra.
Wharton, Neg., sec. 205.

It will be observed that the theory that the injuries received by the plaintiff were the result of an *accident*, for which no one was to blame, was kept from the jury by the rejection of this instruction. Suppose the jury should have believed that Coleman gave warning, as he testified that he did, that Brown did not hear it, as he testified that he did not, but that his failure to do so was the result of his admitted infirmity of hearing, for which no one was to blame, was he entitled to recover? And did not the plaintiff in error have the right to go to the jury upon that entirely natural and reasonable theory?

The only answer heretofore made to the third assignment of error, based on the court's rejection of the defendant's fifth prayer, is the claim that there was evidence *from which the jury could find* that the defendant was guilty of negligence in failing to give the plaintiff information as to the opening or of the use made of it, and that he can not be said, as a matter of law that if the defendant had known of the dangerous use the injury *would nevertheless have happened.*

This, however, is no answer. The jury were not bound to so find. The court did not leave it to them to determine whether the plaintiff's injuries were due to an accident for which no one was to blame, or whether it was attributable to the negligence of the plaintiff, or of his fellow-servant. Its theory of the case, and that upon which it submitted it to the jury, was that the injuries were the result of an accident which must be blamed on some one. This, we submit, was error.

V.

The fourth assignment of error is based upon the refusal of the trial court to instruct the jury, at the request of the defendant, that the latter was not an insurer of the absolute, or even the reasonable safety, of its stable in which the accident in question is alleged to have happened.

The jury, we submit, should have been advised of this familiar rule of law, either in the language of the instruction requested, or in the court's own language.

It is well settled that a master is not an insurer of absolute or reasonable safety. When such reasonable and ordinary care has been taken to protect servants from injury as a reasonably prudent man would take under

the circumstances, the master has performed the full measure of his duty.

2 Thomas, Negligence, etc., 2d ed., 1407, and cases cited.
Biddiscomb *vs.* Cameron, 35 App. Div., 561.
S. C. affirmed, 161 N. Y., 637.
R. Co. *vs.* Garner, 78 Ill. App., 281.
R. Co. *vs.* Lee, 17 Ind. App , 215.
Jones *vs.* R. R. Co., 22 Hun, 284.
Cobb *vs.* Welcher, 75 Hun, 283.
Service *vs.* Shoneman, 196 Pa. St., 63.
Carlson *vs.* Bridge Co., 132 N. Y., 273.
Belleville, &c., Works *vs.* Bender, 69 Ill. App., 189.
R. Co. *vs.* Moore, 29 Ind. App., 52.
Lanza *vs.* Quarry Co., 115 Iowa, 299.
R. Co. *vs.* Sentmeyer, 92 Pa. St., 276.
Man. Co. *vs.* Olsen, 72 Ill. App., 32.
R. Co. *vs.* Oyster, 58 Neb., 1.
R. Co. *vs.* Kings, 14 Tex. Civ. App., 290.
R. Co. *vs.* Beall, 43 S. W. Rep., 605.
R. Co. *vs.* Mauzy, 98 Va., 692.
Coppins *vs.* R. Co., 43 Hun, 26.
Cooley on Torts, 3d. ed., 1139.

VI.

The fifth assignment of error is based upon the refusal of the trial court to grant the seventh instruction requested by the defendant, without modification, and the giving of said instruction to the jury, as modified by the substitution of the word "would" in the fifth and ninth lines thereof, for the word "could."

"Could" was the proper word for the instruction, and the trial court committed error in striking it out. The question relates to an equipment and its use, neither alleged nor claimed to be unusual in the business in

which the plaintiff in error was engaged and the defendant in error was and long had been engaged. He was bound to know its risks, unless they were unaccustomed, unusual ones, which was not pretended, if he could have known them by the use of ordinary care and prudence.

"Could" was used in similar instructions given in the following cases:

Lehman *vs.* Ry. Co., 122 N. W., 1059.
Wonder *vs.* R. Co., 32 Md., 411.
Wood *vs.* Heiges, 83 Md., 257.
Doyle *vs.* Trust Co., 140 Mo., 1.
Osborne, Admr., *vs.* Coal Co., supra.
Ry. Co. *vs.* Higgins, 53 Ark., 458.

As was said by the court in Lehman *vs.* Ry. Co., supra, referring to a similar instruction, containing the word "could:"

> "It does not require the plaintiff to do all he could do to avoid the injury, but to do all that he in the exercise of ordinary care could do."

VII.

The sixth assignment of error is to the refusal of the trial court to grant the ninth instruction requested by the defendant.

The defendant was entitled to have the jury's attention called specifically to the legal presumption that the plaintiff contracted with reference to the risks, hazards and dangers ordinarily incident to the business of his employment, as the company, within his knowledge, then acquired, conducted it at time he entered its service. The instruction goes further than the defendant's seventh instruction and correctly states the law.

Railroad Co. *vs.* Ampey, 93 Va. 108.
Wonder *vs.* R. Co., supra.
Noyes *vs.* Smith, 28 Vt., 59.
Way *vs.* Railroad Co., 40 Iowa, 341.
Wood, Master & Servant, sec. 326.

VIII.

The seventh assignment of error is based upon the refusal of the trial court to instruct the jury, as requested by the defendant, that the law presumes that the salary or compensation paid to the plaintiff by the defendant was in part a consideration for the risks incident to the services performed by him for the defendant.

This instruction contains a correct statement of the law applicable to the case, and should have been granted.

Way *vs.* Railroad Co., supra.
Railroad Co. *vs.* Ampey, supra.
Wonder *vs.* R. Co., supra.
Noyes *vs.* Smith, supra.
Wood, Master and Servant, sec. 326.

IX.

The eighth assignment of error relates to the refusal of the trial court to grant the eleventh instruction requested by the defendant, to the effect that there was no evidence tending to show that Coleman was an incompetent or unfit person for the performance of the duties for which he was employed at the time of the accident, and that the jury must, therefore, presume him to have been a fit and competent person. The defendant, we submit, was manifestly entitled to this instruction.

The declaration, in its fourth count, charged that it was the duty of the plaintiff in error to exercise care and diligence in the matter of employing reasonably skilful, competent, and careful employees so to handle the hay and feed in transmitting the same from the loft above to the stable below as not to endanger the lives and limbs of those employed below, and that it did not perform but wholly disregarded that duty. Coleman was

the only employee to whom, under the evidence in the case, this charge related. Not a scintilla of evidence was offered in support of the charge other than the occurrence of the accident, and the conflicting statements of Coleman and the defendant in error whether or not warning was given. As above pointed out, the former had been performing the duties in question for six years prior to the accident without injury to anyone.

The Court of Appeals, at page 51 of the record, finds, with reference to Coleman, "There is no evidence to the effect that he was not a competent person to perform the duties assigned him." It does not in any way defend or uphold the action of the trial court in rejecting this eleventh prayer, except by sustaining the judgment; nor does it point out how its rejection was other than prejudicial error.

> "It must appear so clearly as to be beyond doubt that the error did not, and could not, have prejudiced the party's rights."
>
> Deery *vs.* Cray, 5 Wall., 807.
> Gilman *vs.* Higley, 110 U. S., 47, 50.
> Smith *vs.* Shoemaker, 17 Wall., 630, 639.
> Moores *vs.* Bank, 109 U. S., 625, 630.
> R. R. Co. *vs.* O'Brien, 109 U. S., 99, 103.
> Mexia *vs.* Oliver, 148 U. S., 664, 673.
> Ward *vs.* Cochran, 150 U. S., 597, 610.
> R. R. Co. *vs.* O'Riley, 158 U. S., 334, 337.
> Rick *vs.* Heurich, 167 U. S., 624, 629.

In The Elton, 142 Fed., 367, the court uses the following language:

> "There was no serious attempt to show that the seaman employed to operate the winch had exhibited incompetence or unskilfulness, or want of skill in respect thereto prior to the accident, much less that any instance or evidence of incompetence was known to the respondents. . . . It

> seems to us that the libelant has signally failed to show negligence in regard to this primary duty of exercising reasonable care in the employment of the men furnished to operate the winch. While it is necessary to define and insist on strict com-compliance with this duty imposed upon the master, it would be unjust as well as illogical to allow the first instance of negligence on the part of the servant to be evidence of an incompetence and unskilfulness of which the master ought to have known at the time of the servant's employment. We must deal with human nature as it exists, and the rules of human conduct prescribed by law, in their practical application, take into account its weaknesses and imperfections. It is common experience that a workman, be he ever so competent and skilful, may at some time and on some occasion fail to live up to his own standards."

In Morgan *vs.* Frank, 158 Fed., 964, Mr. Justice Lurton speaking for the court, said:

> "The case, however, has been mainly presented upon the question whether there was sufficient evidence to carry the case to the jury, and we consider it unnecessary to consider any other error assigned. The burden was upon the plaintiff to show that the injury was due to some negligent act for which the master was in law responsible. If it happened by reason of the negligence of some fellow-servant, the master would not be liable, unless the plaintiff went further and showed a negligent employment or retention of an incapable servant, or that the particular matter of negligence was one which the master could not delegate to another."

The law presumes that the master has exercised proper care in the selection or retention of his servants; and hence, in an action by a servant for an injury alleged to have been caused by the act of a co-employee, the burden of proof is upon the plaintiff who asserts negligence on

the part of the master in the discharge of this duty. Accordingly, it is incumbent upon the plaintiff in such action to show affirmatively not only that the servant was incompetent, but that his incompetency was known to the master, or, by the exercise of due care on the master's part, might have beeen known to him.

12 A. & E. Ency. of Law, 2d ed., 1022.
Wood, Master & Servant, sec. 368.
Wonder *vs.* R. Co., supra.
Baltimore *vs.* War, 77 Md., 593,
Davis *vs.* R. Co., 20 Mich., 105.
Potter *vs.* R. Co., 136 N. Y., 77.
Railway Co. *vs.* Dixon, supra.
R. Co. *vs.* Keegan, supra.

X.

The ninth and last assignment of error grows out of the refusal of the trial court to grant the fourteenth instruction requested by the defendant.

We think the defendant was entitled to this instruction, and particularly in view of the *quantum* of evidence given in the case, on both sides, contradictory of the testimony of the plaintiff, and of the fact that the defendant is a corporation. Under the circumstances of the case, the court, in some way, should have directed the attention of the jury to the interest which the plaintiff had in the result of the trial, as a circumstance to be considered by them in weighing his testimony and determining the credence to be given it. The courts frequently instruct juries that they are authorized to take into consideration the interest of a party to a suit in determining his credibility, in both civil and criminal cases.

11 Ency. Pldg. & Pr., 315, and cases cited.
Reagan *vs.* U. S., 157 U. S., 301.

In Reagan *vs.* U. S., supra (a criminal case), the self-same instructions was given to the jury and the Supreme Court held that the action of the trial court was entirely proper. The opinion of the court was delivered by Mr. Justice Brewer, who, among other things, said:

> "It is within the province of the court to call attention of the jury to any matters which legitimately affect his testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony and denounce it as false. The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is, therefore, a matter properly to be suggested by the court to the jury. But the limits of suggestion are the same in respect to him as to others. It is a familiar rule that the relations of a witness to the matter to be decided are legitimate subjects of consideration in respect to the weight to be given to his testimony. The old law was that interest debarred one from testifying, for fear that such interest might tend to a perversion of the truth. A more enlightened spirit has thrown down this barrier, and now mere interest does not exclude one from the witness stand, *but the interest is to be considered as affecting his credibility. This rule is equally potent in criminal as in civil cases.*"

The right of the parties to have the jury instructed on the law applicable to the case, clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake, is settled beyond question. It is the duty of the trial judge, when requested, to give in charge any requested instruction which is correct as a proposition of law and applicable to the issues, and a violation of duty by the court in this regard is reversible error.

11 Ency. Pldg. & Pr., 213, 214.
Thorwegan *vs.* King, 111 U. S., 549.
Livingston *vs.* Md. Ins. Co., 7 Cranch (U. S.), 507.
Dist. Col. *vs.* Gray, 1 App. D. C., 500.

In District of Columbia *vs.* Gray, supra, it was said:

> "But vague generalities addressed to a jury can not supply the place of specific instructions. The very purpose of instructions is to direct the attention of the jury specifically to the matters relied on by the parties, and to remove the subject of controversy from the domain of vague generality. Thorwegan *vs.* King, 111 U. S., 549; United States *vs.* Bank of the Metropolis, 15 Pet., 377. Of course, the judge was not bound to give the instructions requested by the defendant in the precise terms in which they were requested. But when a prayer for instructions is presented to a trial judge, and the prayer itself is sound in law and applicable to the testimony in the case, it is error in him not to instruct the jury in some sufficient form specifically, and not by vague generalities, upon the precise point to which the instruction is directed, if it is a material point in the case. This was not done in the present instance, and we must regard the failure to do so as error."

On the whole case we respectfully submit that the judgment of the Court of Appeals should be reversed.

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Attorneys for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 168.

STANDARD OIL COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

ABRAHAM BROWN.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

Statement of Case.

This appeal is from a judgment of the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of the District of Columbia, in an action to recover damages for personal injuries.

The plaintiff in error herein and defendant in the trial Court owned and occupied a stable in the District of Columbia, and the defendant in error, the plaintiff in the trial Court, was the driver of one of its oil wagons, the horses attached to which, together with other horses similarly used, were housed and sheltered in said stable. A bale of straw was thrown after dark, on the evening of the accident, through an opening, communicating between the loft of the stable and the stalls below, and fell upon the plaintiff, who at the time had been in the employ of the defendant for only a few days, inflicting upon him serious and permanent personal injuries. The plaintiff's case rested on the contention that he had no knowledge, actual or constructive, of the existence of the hole or opening or of the dangerous use made thereof by the defendant, and that the defendant company having knowledge of the dangerous and regular use made of said hole for nine years before the date of the accident, was negligent in failing to inform or instruct him with respect thereto, and in allowing bales of straw to be thrown down without having given such instruction.

The trial resulted in a verdict in favor of the plaintiff for Six Thousand Five Hundred Dollars ($6,500), upon which, after a motion for a new trial was overruled, the judgment was duly entered from which an appeal was taken to the Court of Appeals, and upon said judgment being affirmed by that Court the case was brought into this Court by writ of error.. In the course of the trial exceptions were taken by the defendant to the refusal of the Court to direct a verdict in its favor and to the refusal or modification of certain instructions which it requested the Court to give to the jury. Upon these exceptions are based nine assignments of error.

In the brief on behalf of the plaintiff in error, pages 3 to 15, inclusive, an attempt is made to state the substance of the evidence given on the trial of the case. An examina-

tion of the record will show that much of the evidence which is material to the case of the defendant in error is omitted from said statement. Reference to such omitted testimony will be found in Division 2 under the First and Second Assignments of Error in this brief.

Attention is also called to the fact that in said brief, statements of fact as to which the evidence is in conflict, are made in numerous instances as if the evidence in respect thereto were uncontradicted. The following are instances: On page 2, it is stated that the plaintiff began work on or about January 9th, or almost a month before the accident, whereas there is testimony tending to show he had been working only about a week. (Rec., pp. 21, 24, 26.) On the same page it is said that the plaintiff was required to groom his horses, which work was done during the daytime, whereas there was testimony to show that the plaintiff was never in the stable in the daytime before his injury. (Rec., p. 22.) It is further stated on the same page that Coleman had been accustomed to transfer the straw used for bedding the horses through the opening in the ceiling, whereas, there is testimony to show that the straw for bedding was also thrown out of the north door, that it was thrown both ways. (Rec., p. 19.) Of course, in all such instances, for the purpose of the hearing in this Court, the most favorable view to the plaintiff which the jury could have taken of such evidence must be accepted as true.

ARGUMENT.

First and Second Assignments.

The refusal of the Court to direct a verdict for the defendant is alleged as error by these assignments (Rec., p. 34), which are discussed under Divisions I and III of the brief of the plaintiff in error (pp. 16 to 62).

The record shows that four reasons were urged in support of the motion to direct a verdict:

(1) There was a fatal variance between the allegations of the amended declaration and the proofs; (2) the accident was not caused by the negligence of the defendant; (3) it resulted from the contributory negligence of the plaintiff; or (4) from the negligence of the plaintiff's fellow-servant (Rec., p. 34).

1. The contention that a variance exists between the allegations and the proof may be dismissed with a word. The quotation from the declaration, found on page 17, appellant's brief, omits important allegations of the fourth count (Rec., pp. 5 and 6), to wit:

> "It became and was also the duty of the said defendant not to permit the said hay and feed to be thus passed through the said hole or opening *without proper warning or timely notice to those employed in the stable below* * * * and *to give its employees engaged in handling or placing the hay and feed as aforesaid, as well as to those who were employed in the stable below, such proper and necessary instructions with respect to the dangers of passing the hay and feed through the said hole or opening,* and the performance of their respective duties as to prevent injury and danger to the lives and limbs of the employees engaged in the stable below, *yet the defendant* * * * *did not* * * * * *do any of the duties that it was called upon to discharge in the premises,* but wholly disregarding its said duties in the premises, did carelessly and negligently allow a bale of * * * hay to fall or pass, or be thrown through the said hole or opening, *without any notice or warning or signal or instruction of any kind to plaintiff, etc.*"

It is submitted that these allegations were sufficient to charge the defendant with negligence in failing to discharge

its duty to inform or instruct the plaintiff of the dangerous use made of the opening.

It is further submitted that an examination of the record will show that the case on both sides was tried on the theory that the question in issue was that defendant had negligently failed to give any notice or instructions of any kind to the plaintiff of such dangerous use, and that no objection was made by defendant's counsel to any of the evidence offered in the course of the trial upon this theory of the case.

Witnesses on both direct and cross-examination were examined with respect to what information for instruction was given by the defendant as to the dangerous use made of the opening, and as to Brown's knowledge of such use, without any suggestion by the defendant that such testimony was not relevant to the issues made by the pleadings. See, for example, testimony of Hunt (Rec., pp. 9 and 10); testimony of Coleman (Rec., p. 12); especially on cross-examination (Rec., pp. 14 and 16), and on re-direct and re-cross-examination (Rec., pp. 17 and 18). See, also, defendant's Instruction XVI (Rec., p. 37).

It can hardly be said that the defendant was prejudiced unless it was misled or surprised. *R. Co. vs. Grant*, 11 App. D. C., 107, 115. It is difficult to conceive why no objection was made to the introduction of this testimony, if there was such a variance between this proof and the allegations contained in the fourth count of the amended declaration as that the defendant had been misled by the one or surprised by the other. Clearly there was no such variance between the allegations of the fourth count and the proof.

The general rule is that no variance between the allegations in the pleading and proof offered to sustain it shall be deemed material unless it be of a character to mislead

the opposite party in maintaining his action or defense on the merits.

Nash vs. Town, 5 Wall., 689.

Liverpool & London and Globe Insurance Co. vs. Gunther, 116 U. S., 113.

In the case of *B. & P. R. Co. vs. Cumberland,* 176 U. S., 232, 238, in disposing of the contention that there was a variance between the allegations and the proof, Mr. Justice Brown said:

> "It is very clear that the variance was not of a character to mislead the defendant at the trial."

In *Grayson vs. Lynch,* 163 U. S., 468, 479, the same Justice, in discussing a variance alleged to exist between the allegation and the proof in that case, pointed out that the failure of the defendants to object to the introduction of the testimony, among other things, constituted "a complete answer to any claim that defendants could have been misled by such variance."

Whether there was a variance as to the other counts, and as to whether the defendant was entitled to an instruction that there could be no recovery under those counts, following *Mining Co. vs. Fulton,* 205 U. S., 60, 79, it is not necessary to inquire. The defendant asked for no such instruction, and the question is not raised on the record.

2. The next question arising is, should a verdict have been directed for the defendant on the ground that there was no negligence on its part. The test to be applied in such a case is well settled:

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact,

and to be settled by a jury, and this, whether the uncertainty arises from a conflict in the testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

Richmond & Danville R. Co. vs. Powers, 149 U. S., 43.

See, also:

McDermott vs. Severe, 202 U. S., 600-604.
Davidson Steamship Co. vs. U. S., 205 U. S., 187.

An examination of the Court's charge to the jury (Rec., pp. 38, 40) shows clearly that all questions relating to negligence—whether of the plaintiff, defendant, or fellow-servant—were submitted to the jury under full and clear instructions. The jury found that the defendant was guilty of negligence, that the defendant was not guilty of contributory negligence, and that the injury did not result solely from the negligence of the fellow-servant. The trial judge refused the motion to direct a verdict for the defendant, and refused to set aside the verdict for the plaintiff (Rec., p. 7). We start, therefore, with a strong presumption that fair-minded men may draw from the testimony different conclusions from those contended for by the appellant, and this Court will not interfere with the judgment unless there was no evidence upon which the finding of the jury could be predicated.

Davidson Steamship Co. vs. U. S., 205 U. S., 187.

With this test then in mind we proceed, first, to inquire whether there was evidence from which a jury could find that the defendant was guilty of negligence. There was evidence as follows:

As to condition and use of stable. The stable was about 50 feet in length, containing two rows of stalls separated by a passage-way or aisle about 12 feet wide. Above was

a loft where feed and straw were kept. There was a hole or opening 4 feet square in the center of the stable and over the aisle or passage-way. That the ceiling of the stable was between 16 and 18 feet above the floor where the horses stood. (See testimony of Chas. H. Hunt, Rec., p. 9). The hole or opening was protected by a "board fence" or wainscoting, extending all around the hole, with a height of from 3 to 4 feet above the floor of the loft, with no protection or covering below the skylight (Rec., pp. 10, 12, 19). This opening, *primarily intended for ventilation and light, was used regularly* for the purpose of throwing *bales of straw* through to the floor below for bedding the horses (Coleman, Rec., pp. 12, 14; Heffner, p. 19). But straw for bedding was also thrown down through the north door (Heffner, p. 19).

The stable was lighted very poorly and the straw for bedding was thrown down in the evening. There was only a little oil lamp or lantern hanging at each end of the stable (Rec., p. 19). One witness said that in the month of February, in the morning you could distinguish a person in the middle of the stable (Rec., p. 19). Brown testified that when he went to work of mornings they sometimes had a little lamp hanging at the extreme upper end of the stable that furnished very little light; that drivers sometimes took it into the stalls with them and then the stable was left dark; that sometimes you would come across a man without knowing there was a man there at all; and that it was also dark in the evenings when he returned from his work (Rec., p. 21). The straw was usually thrown through the hole in the evening, and not thrown down in the morning at all (Rec., p. 17). Coleman, the employee who threw down the straw and who attended to the feeding and bedding of the horses, was not about the stable during the day (Rec., p. 17).

The drivers left the stable before daylight and did not usually return until after dark, especially in winter time, when their hours were longer than in summer (Rec., pp. 10, 18, 20). They were instructed to leave the barn in the morning at 6 o'clock (Heffner, Rec., p. 18). Brown did not return in the evenings before half-past five or six o'clock. He was a new man and could not well locate his territory, and it took him generally longer than any of the drivers to get through (Rec., p. 2). He was never in the stable in daylight before he was injured (Rec., p. 22). It was always dark when he left in the morning and dark when he returned at night (Rec., pp. 21, 26).

The hole and its use was not observable under these circumstances. A new man, who came before daylight and returned after dark, would not observe it. If seen, its use and purpose might not have been obvious. It was a shaft *primarily for ventilation and light,* having skylight above. The feed was put into the stalls through chutes leading from above (Rec., pp. 12, 13), and straw for bedding was thrown down through the north door as well as through this hole (Rec., p. 19). The witness, William Heffner, an employee of the company, when asked if he knew what the hole was for, said, "No, I really do not know" (Rec., p. 20). Joseph Heffner said that while straw was thrown down through it, "he thought it was more of a ventilator than anything else" (Rec., p. 19).

The use made of the hole made the stable dangerous at the times of such use. This is obvious to any one. The Court told the jury that the use of the hole was one that was likely to be dangerous (Rec., p. 38). The witness Coleman so regarded it and said it was dangerous unless a man was warned, because, to use his language, "a man was green about the place, he would not be warned of it, and something might fall on him" (Rec., p. 17).

The plaintiff was a new man about the place. There is some conflict as to the time he had worked. The accident it seems happened on February 2d (Rec., p. 34). The defendant's witness, Parsells, claimed the plaintiff began work about January 9th (Rec., p. 29). Other witnesses fixed the time he had been employed at about two weeks, a little longer or a little less (Rec., pp. 10, 20). Brown said he had worked about a week before he was injured (Rec., p. 21), that the company pays its drivers every two weeks, and that at the time of the injury his first wages had not been received, his wife receiving his first wages after he was in the hospital (Rec., p. 25).

No instruction or warning of any kind was ever given Brown as to the existence or use made of the hole, and he had no knowledge whatever thereof. Hunt said no instructions whatever were given him or any other person as far as he knew by the company as to the operation of the stable (Rec., p. 9). William Heffner said no rules were ever given him or anyone else about the use of the stable (Rec., p. 20). Brown said no instructions were ever given him except as contained in the application, and that the drivers were never told or instructed as to the condition or surroundings inside the stable (Rec., p. 22). He was never told by anybody that the hole was used to drop hay through, and had never seen anything thrown down through the hole, and did not know that the hole was there (Rec., p. 22). Coleman, the employee who threw the bale of straw upon Brown, said he had never received any instructions as to what use he should make of the hole (Rec., p. 12). It is true that he testified that he took it upon himself to tell all the men about the hole and what it was used for, and that he told Brown, but his testimony is in direct conflict with Brown's on this point, and also with Joseph Heffner's (Rec., p. 19), who says that he was never informed as to what the hole was used for.

Clearly, upon this testimony, it was for the jury to determine whether the defendant was guilty of negligence.

> "It is the duty of the master to warn and instruct his servant as to the dangers of which he knows, or ought, in the exercise of reasonable care and diligence to know, and of which the servant has no knowledge, actual or constructive."
> 26 Cyc., 1165.

The jury could well conclude that the use made of the hole made the stable dangerous and that its dangerous use was not so obvious under the circumstances that Brown must have been presumed to know it. The plaintiff's testimony at least tended to show that Brown did not know of the existence of the hole, either from being told by the company or from finding it out himself; and the jury were told that if they believed this testimony it was then a question for them to determine, under all the circumstances, whether the company was negligent in not informing him. The law applicable to this phase of the case could not be more clearly stated that in instructions three, four, seven and eight granted at the request of the defendant (Rec., pp. 35 and 36); and in the Court's charge to the jury (Rec., p. 38). The jury having found under these instructions that the defendant was negligent, surely it can not now be said that absence of negligence on the part of the defendant is a question about which reasonable minds can not differ. For this Court to now set aside the verdict of the jury, approved as it has been by the trial and appellate Courts—

> "would be to exercise the functions of triers of fact, when, under the law, such questions are committed to the determination of a jury."
> *Davidson Steamship Co. vs. U. S.*, 205 U. S., 187, 195.

Since the test in negligence cases is whether the party against whom negligence is alleged used such care as a man of ordinary prudence would have used under the same circumstances, and in no two cases are the facts the same, a study of individual cases can give little assistance beyond furnishing statements of different phases of the general rule. The following cases more or less similar to the case at bar illustrate applications of the rule as to the liability of the master for failure to discharge non-delegable duties he owes to his servants.

In *McGovern vs. C. V. R. Co.*, 123 N. Y., 280, the master directed the performance of certain labor in a wheat bin which, in itself, was not a dangerous place, but liable to become dangerous at times through the moist wheat adhering in considerable quantities to the side of the bin. The company was held liable for injuries sustained by the plaintiff while in the bin in accordance with the orders of the defendant. It was held:

> "That where a servant was employed in a place which may become dangerous, and such danger may be foreseen and guarded against by the exercise of reasonable care, it is the master's duty to exercise such care and adopt such precautions as will protect the servant."

In *Hogarth vs. Pocasset Mfg. Co.*, 1 Am. Neg. Cas., 71 (Mass., 1897), in which the opinion was delivered by Holmes, J., it was held that an employee who was injured by falling into an open trap-door, the existence of which she testified she was not aware of, is entitled to have the question of negligence of the defendant submitted to the jury, and that she was not to be assumed to have known of every detail of the structure without warning.

In *Wheeler vs. Wason Mfg. Co.*, 135 Mass., 294, it was held that if the danger is only obvious to persons having

experience in the particular business, the duty of the master to warn an inexperienced servant of such danger remains.

In *The Anchoria,* 56 C. C. A., 452, it was held that where several rounds of a stationary ladder projecting beyond the side of the ladder, so that the loading appliances of the ship were liable to catch on them and injure the gangway man, and he had no knowledge of the danger, it was the owner's duty to give him notice. The Court said:

> "The libelant was new to the work at this particular place, and was not notified or aware of the condition of the ladder. Nor was he, while doing the work, in such position that he should, in the exercise of ordinary care, have observed its defective condition. * * * In the event of the existence of danger, which was unknown to the gangway man, it was incumbent on the owner to give him notice to that effect in order that he might refrain from exposing himself to the peril, if he should be unwilling to assume the risk."

In *Atkins vs. Merrick Thread Co.,* 142 Mass., 431, the instructions given by the Court were very similar to the charge given in this case. There, as here, it was left to the jury to say whether the defendant should have notified the plaintiff of the danger. The Court said:

> "It is the duty of a master who sets a servant to work in a place of danger to give him such notice and instructions as are reasonably required by the * * * inexperience * * * of the servant."

In *Pratt vs. Prouty,* 153 Mass., 333, 334, the plaintiff knew and appreciated the danger of being hurt by the machine he was working upon, and recovery was accordingly denied. The Court said:

> "To show negligence in the defendant it must appear that the danger was such that the plaintiff would not be presumed to know it, and that the defendant did not give him information of it."

The rule is thus stated in *Ciriack vs. Merchants Woolen* Co., 146 Mass., 189, 190:

> "In order to show actionable negligence on the defendant's part, it was incumbent on the plaintiff to show an omission to inform him of something which he needed to know in order to be safe."

In *Musick vs. Packing Co.,* 58 Mo. App., 322, it was held that a master who sent a servant into a dark room containing a tank, which the servant knew was usually covered, but which the master knew was at the time uncovered, without informing the servant of the fact, was guilty of negligence.

In *Fredenburg vs. North. Central R. Co.,* 114 N. Y., 582, it was held that where a servant, newly employed and unacquainted with the locality where he is set to work, does not assume the risks thereof, which, however obvious in the daytime, were to him unknown. In that case an injury occurred to the plaintiff from stepping into a cattle guard, where he was coupling cars. He had not been at the place in daylight, but he had a lighted lantern at the time. It was left to the jury to determine whether he had any previous knowledge of the existence of the cattle guard and whether it was negligent on his part nor to observe it upon the occasion when he received the injury.

3. We come next to consider whether there was contributory negligence on the part of the plaintiff.

It is contended in the brief of the plaintiff in error (p. 60) that he was guilty of contributory negligence in getting under the opening in question after being warned by Cole-

man. A fatal weakness of the contention is in the assumption that the plaintiff was warned by Coleman.

It is suggested in the brief of the plaintiff in error (p. 61) that inasmuch as Coleman had been called and accredited by the plaintiff as a witness in the case, the contradiction by the plaintiff of his testimony to the effect that he warned the plaintiff and that the plaintiff heard the warning was insufficient to warrant the submission of the case to the jury. Counsel obviously forgot that Coleman was the employee of the defendant who threw the bale of straw upon Brown; that his testimony to the effect that he warned Brown before throwing down the bale of straw was brought out on cross-examination, and that he is not only contradicted by Brown, with respect to the warning in this instance, but that he is also contradicted by other employees of the defendant as to his informing them of the use he made of the hole—notably by Joseph Heffner (Rec., p. 17), who says that Coleman never informed him as to what the hole was used for. There is clear and unequivocal testimony tending to show that no warning was given. The plaintiff said he heard no outcry and received no warning before he was struck (Rec., p. 22), and Coleman himself said that when he "hollered" he "had lost hold of the bale of straw" (Rec., p. 13).

The Court expressly instructed the jury as follows:

> "If you find that Coleman did call to Brown to look out and that Brown heard him, then you would have to say whether Brown exercised the care and prudence which a man of reasonable caution would have adopted in not failing to keep out of the way; and if you find that he was negligent in going in the way after Coleman called to him to look out that would prevent his recovery independent of all the other testimony which has been submitted." (Rec., p. 40.)

The Court also granted the defendant's 17th Instruction as follows:

> "If the jury believe from all the evidence that before the bale of straw referred to in the evidence was thrown down by Coleman, he warned the plaintiff of his intention to so throw down the bale, and that the plaintiff, after hearing and understanding the warning, disregarded it, and walked beneath the opening, then the plaintiff is not entitled to recover, and then their verdict should be in favor of the defendant."

As already pointed out, there was testimony to show that he knew nothing of the existence or use made of the hole, and that he never had been in the stable in daylight.

If the plaintiff's testimony was true, and it must have been found by the jury to be true, there was no contributory negligence on his part.

In *Mather vs. Rillston,* 156 U. S., 391, 400, it was held that where a laborer knows nothing of the special dangers attending his work and was not at all informed by his employers on the subject and is injured thereby, there is no ground for any charge of contributory negligence on his part.

4. The defendant's remaining contention under these assignments is that the injury resulted from the negligence of a fellow-servant of the plaintiff and that the defendant is, therefore, relieved of liability.

The following propositions of law are well settled:

(*a*) The duty to inform and instruct is one of the absolute duties of the master, which can not be delegated so that the master will be relieved of liability for the negligent nonperformance thereof.

> "The duty of warning and instructing a servant is a primary duty of the master, and the delegation of such duty to another servant, whether higher or lower

in the scale of employment than the one exposed to danger, can not relieve him of the responsibility imposed on him by the law."

26 Cyc., 1167.

"The master's duty to give notice to his servants of risks to which the latter would be exposed is an absolute one and is not performed by delegating it to a third person, who fails to give the proper information."

Wheeler vs. Wason Manufacturing Co., 135 Mass., 294.

"The duty of informing a servant of special risks connected with his service, is a primary duty of the master, and the delegation thereof to any inferior servant can not relieve him of the responsibility imposed upon him by law. Whether the servant to whom such duty is delegated be higher or lower makes no difference. By whomsoever performed, the duty is that of the master, and he is always responsible to the servant for its due performance."

Mercantile Trust Company vs. Ry. Co., 53 C. C. A., 207, 115 Fed., 475, 479.

L. & N. R. R. Co. vs. Miller, 43 C. C. A., 436, 104 Fed., 124.

(*b*) The proximate cause of an injury of this kind is a question for the jury.

"What is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances attending."

R. R. Co. vs. Kellog, 94 U. S., 469.

See also *R. R. Co. vs. Cummings*, 106 U. S. 700; 13 Cyc., 27.

(*c*) If we concede, for the argument, negligence on the part of the fellow-servant, still, the defendant was not,

as a matter of law, relieved from liability, if there was evidence from which the jury could find that it was guilty of negligence, and that its negligence contributed to the injury.

> "If the negligence of the company contributed to—that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fellow-servant was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong."
>
> *R. Co. vs. Cummings,* 106 U. S., 705.

> "Where two concurring causes contribute to an accident to an employee, the fact that the master is not responsible for one of them does not absolve him from liability for the other cause, for which he is responsible."
>
> *Wilmington Star Mining Co., vs. Fulton,* 205 U. S., 60.

> "The law can not be reproached with such injustice as is involved in the assertion that a wrong-doing employer may shelter himself behind the act of his employee, who, like himself, has been guilty of an actionable wrong."
>
> *Rogers vs. Layden,* 127 Ind., 50.

See, also—

Deserant vs. Cerillos Coal Co., 178 U. S., 409.
Steamship Co. vs. Merchant, 133 U. S. 375.
Gila River R. Co., vs. Lyon, 203 U. S., 465, 473.

From the foregoing it is clear that even if Coleman, the fellow-servant, was guilty of negligence which contributed to the injury, still, if the company was guilty of negligence

in failing to inform the plaintiff of the dangerous use made of the stable, and its failure to give him this information also contributed to the injury, the company would be liable. The only theory upon which the contention of the plaintiff in error could be sustained would be that the negligence of Coleman as a matter of law was the sole proximate cause of the injury to Brown. What is the proximate cause being a question for the jury, the court could have directed a verdict only if it were so plain that Coleman's negligence was the sole proximate cause of the injury, that reasonable minds could not differ about the question. The court below held that it was a question for the jury to determine what was the proximate cause. The charge was clear and explicit that there could be no recovery if the injury resulted from the negligence of Coleman alone (R., p. 39). The jury have found that the negligence of the company caused or contributed to the injury, and since this was a question for the jury to decide under proper instructions from the court, their finding should not now be disturbed.

The brief of the plaintiff in error (p. 43) seems to imply that Coleman, prior to the time of the injury, had not been throwing down *baled straw*, and that the defendant could not have anticipated his negligent act in the present instance. Coleman himself admits that he was accustomed to throw down bales (Rec., p. 13), and that he knew the practice was dangerous to a new man unless the latter was informed of it (Rec., p. 17); and this practice of Coleman is assumed to have existed throughout the whole record. It was this use of the opening which the trial Court declared was likely to create danger (Rec., p. 38).

Can it now be said as a matter of law that if the defendant had known the dangerous use made of the hole, the injury would nevertheless have happened? It is probable and

natural that if Brown had been aware of this danger, he would have been on the lookout and would not have exposed himself to its risks by placing himself in the position of danger. The imperative rule of law, which requires a master to inform his servants of dangers of which he has knowledge and they have not, is based upon the fact that if men know of the existence of dangers they are likely to be careful to avoid them.

The many cases cited in the opposing brief upon the question we are now considering are in entire accord with our position. The opposing argument in brief is this: Although there may have been negligence on the part of the defendant in failing to inform the plaintiff of the danger, yet the negligence of the fellow-servant in failing to warn him immediately before the bale of straw was thrown down, was the sole proximate cause of the injury, and, therefore, the negligence of the master is immaterial.

Opposed thereto our contention is: Conceding for the argument that there was negligence on the part of the fellow-servant in throwing down the bale of straw under the circumstances, and it being established that there was negligence on the part of the defendant in failing to inform the plaintiff of the dangerous use, it was for the jury to determine whether the negligence of the defendant was a proximate cause of the injury.

It is admitted, and the jury were instructed, that Coleman was a fellow-servant of the plaintiff. There is no evidence that the company charged Coleman with the duty of informing Brown of the dangerous use of the ventilator shaft or opening. But, if the company had charged him with such duty, it would not have been relieved of liability if he negligently performed or failed to perform it; because, as we have seen, the duty is non-delegable.

It may also be admitted that the plaintiff assumed the

risks of the negligent acts of his fellow-servants and that the plaintiff would not have been injured by the hole or ventilator shaft alone, without the intervention of some human agency (appellant's brief, p. 30).

But the argument of plaintiff in error ignores the fact that the use of the opening or shaft was a regular one, and was one of the general risks and dangers of the employment, and that the failure to inform of this use is the act of negligence complained of.

We may admit that if there was a duty on any fellow-servant to inform the plaintiff or employees in the stable of each instance and of the exact time when bales would be thrown from above, and that if the master properly selected and instructed the servant to give the notice each time a bale was thrown down, that the company would not be responsible for the servant's failure to give this specific warning. Our contention now is, and the jury were told by the court below, that the plaintiff was entitled to know of the dangerous use and that the duty was upon the defendant to inform him of the regular and dangerous use of the ventilator shaft, if the jury believed that a reasonable and prudent man, under the circumstances of the case, would have done so.

The master can not be heard to say that because a servant fails to give the special warning, or signal, which it may have been his duty to give, that the master is excused from the duty which the law imposed on him of giving the notice or information as to a danger incident to the employment. A warning or signal which might be entirely sufficient for a man informed of danger, might have no significance to one who had no knowledge that danger was to be anticipated.

An examination of the authorities shows that when it is the duty of the master to give notice of a risk or danger,

it is only when the plaintiff has knowledge, actual, or constructive, of such risk or danger that it can be held that a failure of a fellow-servant to give the specific warning in the special instance is the sole proximate cause and that the master is relieved from liability, for failure to discharge his duty.

> "Although a master is negligent in not giving his servant instructions as to the *dangers of his employment, if the servant receives such information from other sources,* whether from other persons or from his own observation, and is thereafter injured, *the master is not liable,* since his negligence is not the proximate cause of the injury."
> 26 Cyc., 1170.

> "Where a servant has notice of the general risks and dangers of his employment, *such as that many of the cars which he is required to handle,* as a switchman, *are defective,* the master is not guilty of negligence in failing to notify him of each particular defect, as such duty, if required, is one necessarily devolving upon fellow-servants, for whose particular acts of negligence the master is not responsible, and a master who properly selects and instructs a man to give notice to the other servants of the movements of the apparatus being used by them is not responsible for his failure to give warning."
> 26 Cyc., 1168.

The application of these rules is well illustrated in the case of *C. & O. R. Co. vs. Hennessy,* 96 Fed., 713; 38 C. C. A., 307.

All the cases cited in the opposing brief (p. 35 to 40) are also believed to be in entire harmony with this view.

Take, for example, the case of *R. Co. vs. Perriguey,* 138 Ind., 414, cited on pages 37, 38. The court said that the movement of the train, under the management of Ferris,

was the independent wrongful act of a responsible person, and, being the sole cause of the injury, it was held the plaintiff could not recover. In that case the injured person *knew of the general risk of danger from the moving train.* In seeking to apply the doctrine of that case to the case at bar, the appellant's counsel overlook the fact that it was for the jury to find whether Brown knew of the danger to which he was exposed and that the defendant's negligence in not disclosing the dangerous use of the ventilator shaft was a cause for the plaintiff's being in the position of danger. Again in the Perriguey case the court said:

> "Where the defect in the machinery or the want of skill of a fellow-servant, *or the unsafety of the place where occupied,* are within the knowledge of the master, are not known to the servant, and are the immediate cause, or one of the concurring immediate causes of the injury, there is not, and ought not to be, any doubt of the application of the rule that the master may not hide his liability behind the concurring act of his employee."

In the case at bar the unsafety of the place occupied by the plaintiff under the ventilator shaft was unknown to him. It was known to the defendant, whose duty it was to inform the plaintiff of the danger, and the lack of this knowledge on the part of the plaintiff, through the failure of the defendant to inform him, was the immediate cause, or one of the concurring immediate causes of the injury.

The negligence and injury clearly bear the relation of cause and effect. The plaintiff had the right to know the dangerous use of the shaft. The reason he should know it was that it would enable him to look out for the danger when about it. The failure of the defendant to inform him was negligence, and this negligence prevented him from being on the lookout for and avoiding the danger.

So, also, *American Bridge Co. vs. Seeds,* 144 Fed., 605 (plaintiff in error's brief, pp. 40, 43), is entirely consistent with this view. In that case the Court said:

> "The risks that a safe place will become unsafe * * * by the negligence of the servant who uses it is one of the ordinary risks of the employment which the servants necessarily assume when they accept it."

The place in the case at bar was already dangerous at times by reason of the regular use made of the ventilator shaft.

There was that in the use which was likely to be dangerous (Rec., p. 38). It was not, therefore, a question of a place becoming unsafe by negligence, but the question of a place already unsafe because of a regular use made thereof, of which use the plaintiff was entitled to know.

The other cases cited all disclose the same situation, viz., *the person injured knew of the general risk or danger* and the negligence was the negligence of the fellow-servant in not warning of special defects or of the approach of special dangers, which the person injured *knew* might arise at any time. Thus in the injuries happening on railroad tracks or in railroad yards, the persons injured had knowledge that they were exposed to danger from trains running upon the tracks and into the yards. In the case at bar the plaintiff had no knowledge of the existence of the shaft or that bales of straw would be thrown through it. This was a risk, which the jury could find that it was negligent for the defendant not to inform him of.

All the authorities referred to in the brief of plaintiff in error with respect to the assumption of risks and the duty of the master to warn the servant only of dangers which the servant does not know, and which a reasonable man would have reason to believe the servant was ignorant of,

are in harmony with the Court's charge to the jury and with the instructions given on behalf of the defendant.

The charge, in short, said that the use made of the opening was one that was likely to be dangerous; that all the plaintiff was entitled to was to know of the use; that if he had that knowledge the defendant was not liable, no matter how the knowledge was obtained; that if the plaintiff did not know of the use, it was for the jury to determine whether, under all the circumstances, it was negligence on the part of the defendant not to inform him; that if the circumstances were such that a reasonable man, exercising ordinary prudence, would have found it out for himself, the defendant was not liable for not informing him; and that, if the plaintiff was injured through the negligence of Coleman alone, the defendant was not liable. None of the cases cited go further than the Court's charge, or state the law more favorably to the defendant.

It is, therefore, respectfully submitted that it can not now be said, as a matter of law, that the injury was caused solely by the negligence of a fellow-servant.

Third and Fourth Assignments.

These assignments, which are discussed under Divisions IV and V of the opposing brief, complain of the refusal of the Court to grant the defendant's Instructions V and VI (Rec., p. 35), in which the Court was asked to instruct the jury, among other things, as follows:

> "The jury are instructed that the defendant company was not an insurer of the safety of the plaintiff while he was at work for it."
>
> "The jury are instructed that the defendant was not an insurer of the absolute or even the reasonable safety of its stable in which the accident in question is alleged to have happened."

It is contended that the defendant was prejudiced because the Court did not specifically say to the jury that it was not an insurer of the safety of the plaintiff or of its stable.

There was no contention or suggestion by any one that the defendant was an insurer. The question was not in the issue. The charge and instructions granted excluded all possibility of such a view being taken by the jury. Only one duty was imposed upon the defendant by the instructions, viz., the duty of informing the plaintiff, if he did not know of the danger, and if the conditions were such that a reasonably prudent man would not have failed to inform him. This being the only issue respecting the defendant's duty to the plaintiff, how could it have possibly enlightened the jury to have been told that the defendant was not an insurer. The proposition was irrelevant to the issue and if it be admitted that it would have done no harm to grant the instruction, it is certain that the defendant was not prejudiced by its refusal. It could hardly help to enumerate to the jury the duties of the defendant not involved in the case when they were concerned with only one duty which was clearly explained to them.

The jury was expressly charged that if the defendant was not negligent with respect to the duty of informing the plaintiff it was not liable; that if he was guilty of contributory negligence he could not recover and that if injured through the negligence of Coleman, his fellow servant, he could not recover.

Quoting from the authority cited in the appellant's brief on page 72:

> "Vague generalities addressed to a jury can not supply the place of specific instructions. The very purpose of instructions is to direct the attention of the

jury specifically to the matter relied on by the parties, and to remove the subject of controversy from the domain of 'vague generality.' "

D. C. vs. Gray, 1 App. D. C., 500.

Fifth and Sixth Assignments.

These assignments which are discussed under Divisions VI and VII of the opposing brief complain of the modification of Instruction VII (Rec., p. 35) by changing the word *could* to *would,* where the former occurred therein; and in refusing Instruction IX (Rec., p. 36) on the ground that it was a repetition of what was contained in VII. Instruction VII as modified reads as follows:

> "The jury are instructed that the plaintiff, by entering the employment of the defendant company and engaging in the work assigned to him, assumed the ordinary risks, hazards, and dangers incident thereto, not only so far as they were actually known to him, but also so far as they *would* have been known to him, by the exercise of ordinary care on his part; and if the jury believe from the evidence that the plaintiff, prior to the time he was struck by the bale of straw mentioned in the evidence, knew, or by the exercise of ordinary care and prudence *would* have known of the existence of the hole or opening complained of, and the manner in which straw or other material used in the defendant's stable was thrown down from the loft through said hole or opening into the stable below, then the plaintiff can not recover, and the verdict should be for the defendant."

Obviously this instruction states the law of assumed risk clearly. If there is error at all it is that the law is stated more favorably to the defendant than it was entitled to have it.

In *R. Co. vs. McDade,* 191 U. S., 64, 68, the Court said:

"The charge of the Court upon the assumption of risk was more favorable to the plaintiff in error than the law required as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover the dangers but whether the defect is known or plainly observable by the employee."

See also—

T. & P. Ry. Co. vs. Archibald, 170 U. S., 665, 674.
R. Co. vs. O'Leary, 35 C. C. A., 566.
Carter vs. McDermott, 29 D. C. App., 145, 161.

Seventh Assignment.

Under this assignment (Division XIII opposing brief) it is contended that it was error for the Court to refuse defendant's Instruction X, which is as follows:

"The jury are instructed that the law presumes that the salary or compensation paid to the plaintiff by the defendant company while he was in the company's employ was in part a consideration for the risks, hazards, and dangers ordinarily incident to the services performed by him for the defendant."

The instruction could in no wise have assisted the jury in arriving at a correct decision of the case. The law of assumed risk was clearly explained. The effect of the instruction, if granted, might have been to cause the jury to believe that the wages the plaintiff had received from the company was in part compensation for the injuries he sustained. At least, it would have required additional explanation to make clear to them the meaning of the phrase, "consideration for the risks, hazards, and dangers incident to the services performed."

Moreover, according to modern judicial opinion, the philosophy or reason of the doctrine of assumed risk as embodied in the instruction seems to be more of a legal fiction than the real basis of the rule.

> "Assumption of risk * * * obviously shades into negligence as commonly understood. Negligence consists in *conduct* which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor that he is held answerable for that result, although it was not certain, intended or foreseen. He is held to assume the risk upon the same ground. * * * The difference between the two is one of degree rather than of kind."
>
> *Schlemmer vs. R. Co.*, 205 U. S., 1, 12.

Eighth Assignment.

This assignment complains of the refusal of the Court to grant the defendant's Instruction XI. Whether or not the servant was incompetent was not one of the issues submitted to the jury. On the contrary, all issues except the single issue submitted were expressly excluded from their consideration. We refer again to the language of Judge Morris quoted on page 72 of the plaintiff in error's brief, to the effect that the very purpose of instructions is to direct the attention of the jury specifically to the matters relied on by the parties.

Ninth Assignment.

This assignment alleged as error the refusal of the Court to grant the defendant's Instruction XIV (Rec., p. 37). This instruction asked the Court to single out the testimony of the defendant and specially call the jury's attention to the matters they should consider "in determining how far

or *to what extent, if at all, it is worthy of credit.*" We respectfully submit that while it may not be error for a court to grant such an instruction, it might be under some circumstances manifestly improper to do so and the trial court is the judge of the circumstances. It is true that it has been held (*Reagan vs. U. S.*, 157 U. S., 301) that it is not reversible error to grant the instruction in a criminal case, this Court saying:

> "It is within the province of the Court to call attention of the jury to any matters which legitimately affect his testimony and his credibility."

But the decision that it is not reversible error to grant the instruction, would not seem equivalent to holding that it is reversible error to refuse it under any circumstances. The matter would appear to have been within the discretion of the trial court; defendant's Instruction XV was granted and its counsel were left in all respects free to argue to the jury all matters affecting the credibility of witnesses.

It is respectfully submitted that there is no error in the record and that the judgment should be affirmed.

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STANDARD OIL COMPANY *v.* BROWN.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 168. Argued April 22, 25, 1910.—Decided May 31, 1910.

While the pleadings and proofs should correspond, a rigid exactitude is not required, and no variance should be regarded as material where the allegation and proof substantially correspond.

Even if there is a variance between declaration and proof, if, as in this case, defendant is not misled, makes no objection to plaintiff's proof but replies to it by testimony of like kind, is familiar with the facts, does not indicate the variance and does not move for continuance, the variance cannot be regarded as fatal.

The extent of the knowledge of a defendant employer as to the use made of appliances by an employé by whose act another employé is injured and the conclusions to be drawn therefrom are questions for the jury and cannot be reviewed here.

The substitution of "would" for "could" in an instruction to the jury in this case *held* not to have affected the minds of the jurors.

In this case there was no reversible error because the court did not impress upon the jurors the fact that interest may affect credibility of witnesses; and, *quære* whether a party testifying exercises a privilege which may be emphasized as affecting his credibility.

31 App. D. C. 371, affirmed.

THE facts are stated in the opinion.

Mr. A. Leftwich Sinclair and *Mr. Joseph J. Darlington*, for plaintiff in error:

To entitle a plaintiff to go to the jury, the evidence

offered in support of his pleadings must conform closely to the allegations thereof. 13 Ency. Pl. & Pr. 910, and cases cited; *Hetzel* v. *Railroad Co.*, 7 App. D. C. 524; *Arrick* v. *Fry*, 8 App. D. C. 125.

Where a plaintiff has charged particular negligence, proof of other and different acts or omissions as a ground of liability will constitute a fatal variance. *Shanke* v. *U. S. Heater Co.*, 125 Michigan, 346; *Brown* v. *Miller*, 62 S. W. Rep. 547; *Railroad Co.* v. *Shockman*, 52 Pac. Rep. 446; *Waldhier* v. *Railroad Co.*, 71 Missouri, 514; *Pennington* v. *Detroit &c. R. Co.*, 90 Michigan, 505; *Marquette R. R. Co.* v. *Marcott*, 41 Michigan, 433; *Batterson* v. *Railroad Co.*, 49 Michigan, 184; *Alford* v. *Dannenberg*, 177 Illinois, 331; *Railroad Co.* v. *Foss*, 88 Illinois, 551; *Railroad Co.* v. *Mock*, 72 Illinois, 141; *Railroad Co.* v. *Collins*, 118 Ill. App. 270; *Long* v. *Doxey*, 50 Indiana, 385; *Curren* v. *Railroad Co.*, 86 Missouri, 62; *Iscber* v. *Bridge Co.*, 95 Missouri, 261; *Sayward* v. *Carlson*, 1 Washington, 29; *Brown* v. *L. & L. Co.*, 65 Mo. App. 162; *Thomas* v. *Railroad Co.*, 35 S. W. Rep. 910; *Pryor* v. *Railroad Co.*, 90 Alabama, 32; *Railroad Co.* v. *Guyton*, 36 So. Rep. 84; *The Elton*, 142 Fed. Rep. 367; Labatt, M. & S., § 859, note 1 (*a*).

There is a fatal variance where the evidence, instead of proving the tort alleged, proves or tends to prove another tort. 14 Ency. Pl. & Pr. 336; 22 Ency. Pl. & Pr. 568.

Where there is no evidence sustaining counts in a declaration as to the defendant's negligence, he is entitled to an instruction that no recovery can be had under the counts. *Mining Co.* v. *Fulton*, 205 U. S. 60.

Persons standing in such a relation to one another, as did the plaintiff and Coleman, are fellow-servants. *Railway Co.* v. *Dixon*, 194 U. S. 338; *Railroad Co.* v. *Conroy*, 175 U. S. 323; *Railroad Co.* v. *Poirier*, 167 U. S. 49; *Oakes* v. *Mase*, 165 U. S. 363; *Railroad Co.* v. *Keegan*, 160 U. S. 259; *Railroad Co.* v. *Hambly*, 154 U. S. 349; *Railroad Co.* v. *Baugh*, 149 U. S. 368; *Tuttle* v. *Milwaukee Ry. Co.*, 122

U. S. 189; *Randall* v. *Railroad Co.*, 109 U. S. 478; *Elevator Co.* v. *Neal*, 65 Maryland, 438; *Wonder* v. *Railroad Co.*, 32 Maryland, 411; *Adams* v. *Iron Cliffs Co.*, 78 Michigan, 271; *Hogan* v. *Railroad Co.*, 49 California, 128.

One who enters into the employment of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. *Railway Co.* v. *Dixon*, *supra*; *Railroad Co.* v. *Conroy*, *supra*; *Railroad Co.* v. *Poirier*, *supra*; *Railroad Co.* v. *Keegan*, *supra*; *Railroad Co.* v. *Baugh*, *supra*; *Tuttle* v. *Milwaukee Ry. Co.*, *supra*; *Randall* v. *Railroad Co.*, *supra*; *Carter* v. *McDermott*, 29 App. D. C. 145; *Looney* v. *Railroad Co.*, 24 App. D. C. 510; *Wonder* v. *Railroad Co.*, *supra*; *Md. Clay Co.* v. *Goodnow*, 95 Maryland, 330; *Moret* v. *Car Works*, 99 Maryland, 461; *Railway Co.* v. *Conrad*, 62 Texas, 627; *Hogan* v. *Smith*, 125 N. Y. 774.

A man of mature age, offering himself to pursue a particular employment, who represents himself to have had the necessary experience, cannot after an injury be heard to say that he should have been instructed by his employer in the performance of his duties. *Hayzell* v. *Railroad Co.*, 19 App. D. C. 359, 369; *Railway Co.* v. *Clark*, 108 Illinois, 113; *Regan* v. *Palow*, 62 N. J. L. 30; *Sumey* v. *Holt*, 15 Fed. Rep. 880; *Railroad Co.* v. *Boland*, 96 Alabama, 626; *Railroad Co.* v. *Barry*, 56 U. S. App. 37; *Martin* v. *Railroad Co.*, 166 U. S. 403; *Randall* v. *Railroad Co.*, *supra*.

The duty to instruct and warn as to dangers arising from the execution of the general details of the work is generally held to pertain to the duties of the servants as between themselves, so that a failure or negligence in regard thereto is that of a fellow-servant, exempting the master from liability. 26 "Cyc." 1338, 1339; *Miller* v. *Railroad Co.* (N. J.), 31 Am. & Eng. R. R. Cases, N. S., 639; *Jenkins* v. *Railroad Co.*, 39 S. C. 507; *Moret* v. *Car Works*, 99 Maryland, 471; *Kemmerer* v. *Railroad Co.*, 81

Hun, 444; *Hussey* v. *Coger*, 112 N. Y. 614; *Cullen* v. *Norton*, 126 N. Y. 1; *Potter* v. *Railroad Co.*, 136 N. Y. 77; *Melchert* v. *Brewing Co.*, 140 Pa. St. 448; *Zurn* v. *Tetlow*, 134 Pa. St. 213; *Allison Mfg. Co.* v. *McCormick*, 118 Pa. St. 519; *Keats* v. *Nat. Heeling Mach. Co.*, 65 Fed. Rep. 940; *Railroad Co.* v. *Smithson*, 45 Michigan, 212; *Kohn* v. *McNulta*, 147 U. S. 238.

Mr. Creed M. Fulton and *Mr. W. Gwynn Gardiner*, with whom *Mr. A. E. L. Leckie* and *Mr. Joseph W. Cox* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action was brought in the Supreme Court of the District of Columbia for damages for injuries alleged to have been received by defendant in error while in the employment of plaintiff in error and through its negligence.

The case was tried to a jury, which rendered a verdict in favor of the defendant in error in the sum of $6,500, upon which judgment was duly entered. It was affirmed by the Court of Appeals.

The assignments of error are based on certain instructions asked by the company which the trial court refused to give, the chief of which requested the court to direct the jury to find a verdict for the company upon the following grounds: (1) There was a fatal variance between the pleadings and the proof. (2) The injury to defendant in error was not caused by the negligence of the company, but by the negligence of a fellow-servant or his own contributory negligence.

The first ground is the principal one discussed by counsel, and turns upon a consideration of the declaration and the proof.

An outline of the facts contained in the opinion of the Court of Appeals is as follows:

"The plaintiff entered the employ of the defendant in January, 1904, as an oil tank wagon driver. His duties required him to take a team and wagon from defendant's barn in the morning, and, after using it during the day in the delivery of oil, return it to the barn in the evening. The plaintiff was required to groom his team in addition to his duties of delivering oil. The barn in which the horses were kept was thirty feet wide and fifty feet long. It contained two rows of stalls, one on either side, with a space of twelve feet between, extending the full length of the barn. In the ceiling, above the space between the stalls and about the middle of the barn, there was an opening four feet square, surrounded on the floor of the loft above by a wooden enclosure or box about four feet high. In the loft was stored baled straw, which was used for bedding the horses.

"It further appears that for about nine years one Coleman had been employed by the defendant, and among his duties was that of bedding the horses; that, during the period of his employment, Coleman had been accustomed to throw bales of straw through the opening in the ceiling from the loft to the floor below. In doing so it was necessary to lift the bale up to the top of the box or enclosure in the loft and push it over, so that it would fall through the opening. Plaintiff received the injuries complained of February 2, 1904, by being struck by a bale of straw dropped by Coleman from the loft through said opening.

* * * * * * * *

"There was evidence adduced at the trial to show that plaintiff had never been advised by the defendant, or any of defendant's employés, either of the existence of the opening in the ceiling or the purpose for which it was used. Plaintiff testified to this effect, and further, that during the period of his employment—less than two weeks—he was required to leave the barn with his wagon

to deliver oil at 6 o'clock in the morning, and that he did not complete the delivery of the oil and return to the barn until 6 or 7 o'clock in the evening. At the time of year that he was employed—in January—he left the barn before daylight in the morning and returned after dark in the evening. It also appears that the barn was poorly lighted, there being but a small oil lamp at each end of the passageway between the stalls.

"The witness Coleman testified that he not only notified plaintiff of the use made of the opening in the ceiling, but warned him before throwing down the bale of straw that injured him."

Defendant in error denied "that Colemar either called his attention to the hole, or explained its use, or gave him any warning on the evening of the accident. Coleman is not corroborated by any of the employés, as to his custom of calling out to persons below before throwing straw through the opening."

The declaration contained four counts, in the first three of which, with some verbal variations, it is alleged that it was the company's duty to have the "hole or opening" in the ceiling of the stable so guarded that the bales of hay in the loft above would not fall or pass through and fall upon defendant in error or upon those engaged in the performance of their duties in the stable. This duty, it is alleged, was neglected, and a bale of hay was allowed to fall through the hole on the defendant in error.

Those counts may be dismissed from consideration, as defendant in error does not contend that the proof corresponds to them.

The fourth count, it is insisted, has such correspondence, and expresses the grounds upon which the case was tried. The following are the pertinent allegations of that count:

"It became and was also the duty of the said defendant not to permit the said hay and feed to be thus passed through the said hole or opening without proper warn-

ing or timely notice to those employed in the stable below . . . and to give its employés engaged in handling or placing the hay and feed as aforesaid, as well as to those who were employed in the stable below, such proper and necessary instructions with respect to the dangers of passing the hay and feed through the said hole or opening, and the performance of their respective duties as to prevent injury and danger to the lives and limbs of the employés engaged in the stable below, yet the defendant . . . did not . . . do any of the duties that it was called upon to discharge in the premises, but, wholly disregarding its said duties in the premises, did carelessly and negligently allow a bale of . . . hay to fall or pass, or be thrown through the said hole or opening, without any notice or warning or signal or instruction of any kind to plaintiff," etc.

The rule is familiar and elementary that the pleadings and proof must correspond, but a rigid exactitude is not required. In *Nash* v. *Towne*, 5 Wall. 689, 698, it is said that modern decisions in regard to the correspondence between the pleadings and the proof are more liberal and reasonable than former ones, and states the rule to be by statute in the Federal courts "to give judgment according to law and the right of the cause." It was observed that "it is the established general rule in the state tribunals that no variance between the allegations of a pleading and the proofs offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action on merits." The comment of the court is that irrespective of [illegible] statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond. See also *Liverpool and London and the Globe Ins. Co.* v. *Gunther*, 116 U. S. 113; *B. & P. R. R. Co.* v. *Cumberland*, 176 U. S. 232, 238.

In the case at bar the company could not have been

misled. It made no objection to the testimony of the plaintiff (defendant in error here). It replied to it by testimony of like kind. It did not indicate in what way the proof varied from the pleadings nor move for a continuance. Moreover, we think the pleadings, though inartificially drawn, were sufficient to notify the company that one of the grounds of action was its omission of duty to inform those whose employment made it necessary to be in the stable of the danger to them of the use to which the hole was put. And that such use was dangerous is demonstrated. Indeed, it should not have needed the experience of the present case to make the danger clear to the company. The company was familiar with the stable, its construction and what that construction required. One just employed might not know either, and his time of service might keep both from his knowledge. And such is the contention in this case, which the verdict of the jury sustained. A dimly lighted stable before daylight and a dimly lighted stable after daylight, with a hole in its ceiling through which bales of hay could be tossed or dropped, seems to us as not to fulfill the duty of a master to those servants who have not been informed of the practice and the performance of whose duties subjected them to the danger which might result. Let it be granted that Coleman was a fellow-servant of defendant in error and was negligent, it was nevertheless for the jury to say whether the fault of the company contributed to the injury. *Kreigh* v. *Westinghouse, Church & Kerr Co.*, 214 U. S. 249. If the plaintiff had had knowledge of the situation and its dangers he might have needed no warning from Coleman, and might have been protected by the care which such knowledge would have induced.

The negligence of a fellow-servant was sought to excuse the master for his neglect in *Grace & Hyde* v. *Kennedy*, 99 Fed. Rep. 679, *S. C.*, 40 C. C. A. 69. In reply to it the court said, by Circuit Judge Shipman:

"The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employés, and that the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servants to do the things which will obviously prevent the known original danger."

In the discussion so far we have assumed that the company had knowledge of the use to which Coleman had put the hole. Counsel, however, attacks the assumption, and meets it by saying that the company could not anticipate that Coleman would throw down an unopened bale of straw without giving warning to his co-employés, especially, as it is further urged, he had been throwing down straw through the opening without negligence for about six years. But what the facts were in such regard and what conclusions were to be drawn from them were for the jury and cannot be reviewed here.

Error is assigned upon the refusal of the court to give instructions, which presented the following propositions: (1) That the company was not an insurer of the safety of defendant while in its employment, "nor of the absolute or even reasonable safety of its stable." (2) That the presumption of law is that plaintiff contracted with reference to the risks, hazards and dangers ordinarily incident to the business of his employment as the company conducted it at the time he entered its services. And that (this was an independent instruction) the salary or compensation received by the defendant in error was the consideration for such risks. (3) There was no evidence that Coleman was incompetent and that his competency must be presumed.

It is not necessary to give a detailed attention to these instructions. The court in its charge to the jury expressed the legal principles of the case which were applicable to the testimony.

The company also asked another instruction, the sub-

stance of which was as follows: That defendant in error assumed the ordinary risks not only actually known to him, but so far as they *could* (italics ours) have been known to him by the exercise of ordinary care on his part, and that if he knew, or by the exercise of care and prudence *could* have known, of the existence of the hole then he could not recover. The court gave the instruction, but substituted the word "would" for "could."

The court was further requested to instruct the jury that they must look to the interest of the witnesses, and that where a witness is interested "the temptation is strong to color, pervert or withhold the facts." An application was made of this to defendant in error and it was requested that the jury be told that the law permitted him to testify in his own behalf, and that he having availed himself of the privilege, it was for them to determine how far his testimony was credible, and that his personal interest should be considered in weighing his evidence and in determining how far it was worthy of credit. The instruction was refused.

But little comment is needed on the contention that there is reversible error in the action of the court. It would be going very far to reverse the judgment on the supposition that the jury would have seen a different meaning in the word "could" than they saw in the word "would" and in consequence would have imputed a greater knowledge to defendant in error of the risks of his employment. And it would be going equally far to reverse the verdict because the jury did not have especially impressed on it, in the language counsel chose to employ, that interest may affect the credibility of witnesses. We are not prepared to say that a party to an action by testifying exercises a privilege which may be emphasized as affecting his credibility.

Judgment affirmed.